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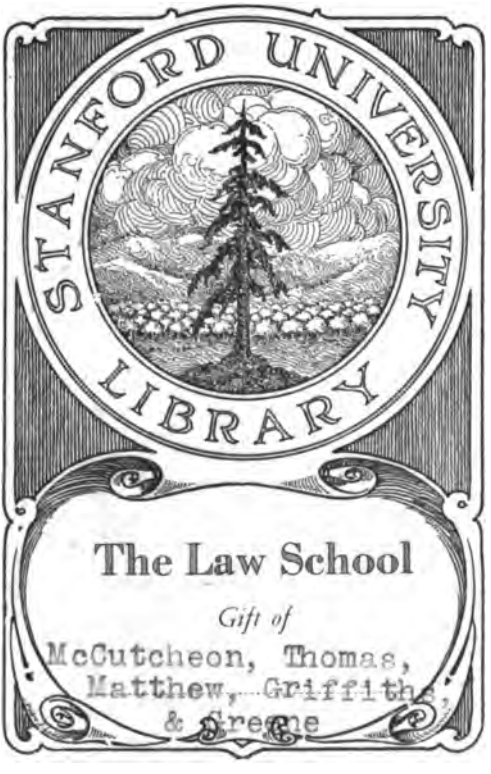
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TREATISE

ON THE

CIVIL AND CRIMINAL JURISDICTION

OF

JUSTICES OF THE PEACE

AND DUTIES OF

SHERIFFS AND CONSTABLES:

ESPECIALLY ADAPTED TO THE

PACIFIC STATES AND TERRITORIES.

BY

CHARLES W. LANGDON,

ATTORNEY AT LAW.

SAN FRANCISCO:

PRINTED BY A. L. BANCROFT AND COMPANY,

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PREFACE.

The author of tbis treatise has directed his labors, in its compilation, with special reference to the duties and office of Justices of the Peace and officers attendant upon the Justice's Court. The existence of this Court is an admitted necessity, and, notwithstanding its jurisdiction is limited, it embraces a large portion of the litigation, both civil and criminal, in this State. In its organization, the Legislature has not authorized a departure from any of the known rules and established principles in legal adjudications. It has relaxed the strict observance of particularity and exactness required of other Courts, but not to the extent of disregarding the long-established rules of property and the value of an acquaintance with them.

It is not enough that a Justice of the Peace should be impartial and sensible—that he should be honorable and practical; all this is useful in a Justice, but, at best, is as uncertain as may be the causes bearing upon his friendships or exciting his passions. The individual notions and views of right and wrong entertained by men, give rise to litigation; and if rules and principles were not established, by the strict observance of which these conflicts may be settled, there would be no law, and the might of power would predominate. Therefore it is that the Legislature has declared, that this Court, like others, shall be governed by

rules, and has, by several enactments, marked out those rules with great care and exactness.

These statutes have been framed in the light of the opinions and decisions of the great jurists of the past and present, as they appear in the books containing them. It is obvious, then, that upon a right understanding of these laws, and the rules and principles they invoke in the decision of controversies, the security of property within their jurisdiction mainly depends.

Errors in judgment are to be expected. The most cultivated intellects cannot claim exemption from error. Men who have industriously devoted their lives to the study and practice of law, admit, at the end of their labors, that they did not more than attain a point from which they could comprehend their ignorance. How, then, can it be expected of our best men, who, at the solicitation of friends, have been induced to accept its responsibilities without having previously studied the law, can adjudge and decree correctly?

It is not pretended that this book will supply the want of a legal education. It is only the result of an endeavor to assist Justices of the Peace and the officers of their Court —Sheriffs and Constables—in the discharge of their useful and laborious duties.

To this end, it contains all the statutes enacted by the Legislature of California, up to the adjournment of its session in 1870, having relation thereto, and the decisions of our own Supreme Court expounding them, as well as many decisions by the Courts of other States on similar statutes.

Forms of processes, orders and returns, necessary to carry out the provisions of the Practice Act—civil and criminal—have been carefully prepared, and will be found in connection with the subjects requiring them.

The author respectfully suggests, that lawyers will find

it useful as a book of reference; nor can he persuade himself that the man of business who has an interest in the structure and mode of enforcing contracts, may slightly regard its importance to him.

The author acknowledges his great obligations for the aid he derived from Mr. Charles H. Parker's excellent "Digest of California Reports and Statutes." The author has also received great assistance from Mr. Cowen's valuable "Treatise on Justices." Chitty and Parsons on Contracts, have been freely consulted, so also have Greenleaf, Bouvier's Institutes and Kent's Commentaries. This book, however, is mainly a condensation of all that the Supreme Court of this State has pronounced on subjects pertaining to Justices of the Peace. Decisions of the Supreme Court of Nevada and of other States are given on subjects to which they are pertinent.

The compiler of this work would not disregard the encouragement he has received from Members of the Bar in Sonoma County; and particularly would he express his grateful recognition of the zeal and industry of Henry Colter, Esq., to whose unceasing labors he is indebted for the early completion of this work.

C. W. LANGDON.

SANTA ROSA, April 17th, 1870.

ERRATA.

Page 31, section 34, for "Has a justice," read "A justice."

Page 44, section 29, for "proceeding," read "preceding."

Page 103, section 24, between the words "assignment" and "of the debt," read the words "of the mortgage without the assignment."

Page 335, section 116, second line, for the words "is entitled," read "is not entitled."

TABLE OF CONTENTS.

PART FIRST.

Page.

CHAPTER I.

Justices of the Peace, Election of, etc. 1

CHAPTER II.

Jurisdiction of Justices 22

CHAPTER III.

Contracts, in General 36

CHAPTER IV.

Contracts Particularized, what Constitutes 46

CHAPTER V.

Contract of Account 78

CHAPTER VI.

Contract of Agents 80

CHAPTER VII.

Contract of Assignment 99

CHAPTER VIII.

Contract of Bailment 113

CHAPTER IX.

Contract of Common Carriers 122

CHAPTER X.

Contract of Corporations 141

CHAPTER XI.

Contract of Debt 144

CHAPTER XII.

Contract of Freight 148

CHAPTER XIII.

Contract of Husband and Wife 149

CHAPTER XIV.

Contract of Money Had and Received 162

Page.

CHAPTER XV.

CONTRACT OF PARTNERSHIP..... 164

CHAPTER XVI.

CONTRACT OF SALE..... 178

CHAPTER XVII.

CONTRACT OF WAGES..... 183

CHAPTER XVIII

CONTRACT OF WORK AND LABOR..... 186

CHAPTER XIX.

ABATEMENT..... 194

CHAPTER XX.

ABANDONDMENT..... 196

CHAPTER XXI.

ACKNOWLEDGMENT AND FORMS OF..... 197

CHAPTER XXII.

ACTIONS AGAINST STEAMERS, VESSELS, ETC..... 202

CHAPTER XXIII.

ADJOURNMENT..... 209

CHAPTER XXIV.

AMENDMENTS..... 215

CHAPTER XXV.

APPEALS..... 218

CHAPTER XXVI.

APPEARANCE..... 231

CHAPTER XXVII.

ARREST..... 235

CHAPTER XXVIII.

ARGUMENT OF COUNSEL..... 247

CHAPTER XXIX.

ARBITRATION..... 247

CHAPTER XXX.

ATTACHMENT..... 256

CHAPTER XXXI.

ATTORNEY AT LAW..... 295

CHAPTER XXXII.

BILLS OF EXCHANGE AND PROMISSORY NOTES..... 297

CHAPTER XXXIII.

CALLING OF CAUSE..... 354

Page.

CHAPTER XXXIV.

CERTIORARI 355

CHAPTER XXXV.

CHATTEL MORTGAGE 356

CHAPTER XXXVI

CLAIMS AGAINST ESTATES OF DECEASED PERSONS 362

CHAPTER XXXVII.

CLAIMS AND DELIVERY OF PERSONAL PROPERTY 368

CHAPTER XXXVIII.

CONTEMPTS 385

CHAPTER XXXIX.

COSTS 388

CHAPTER XL.

DAMAGES 389

CHAPTER XLI.

DEPUTATION 393

CHAPTER XLII.

DEPOSITIONS 395

CHAPTER XLIII.

DISMISSAL AND DISCONTINUANCE 402

CHAPTER XLIV.

DOCKET, JUSTICE'S 404

CHAPTER XLV.

ESTOPPEL 410

CHAPTER XLVI.

ESTRAYS 416

CHAPTER XLVII.

EVIDENCE 429

CHAPTER XLVIII.

EXECUTION 457

CHAPTER XLIX.

FENCES, INJURY TO PROPERTY 476

CHAPTER L.

FERRIES AND TOLL BRIDGES 481

CHAPTER LI.

FORMER RECOVERY 482

CHAPTER LII.

FRAUD 485

Page.

CHAPTER LIII.

INJURY BY CONFUSION OF GOODS 496

CHAPTER LIV.

INJURY TO PERSON OR CHARACTER, MALICIOUS PROSECUTION 497

CHAPTER LV.

INJURY TO PERSONAL PROPERTY 497

CHAPTER LVI.

INJURY TO THE PERSON 500

CHAPTER LVII.

INSOLVENCY 505

CHAPTER LVIII.

INTEREST 508

CHAPTER LIX.

INSTRUCTIONS 511

CHAPTER LX.

JUDGMENT 515

CHAPTER LXI.

LANDLORD AND TENANT 524

CHAPTER LXII.

LIENS OF MECHANICS AND OTHERS 532

CHAPTER LXIII.

LIMITATION, STATUTE OF 545

CHAPTER LXIV.

LIQUIDATED DAMAGES 550

CHAPTER LXV.

MANNER OF COMMENCING ACTION 553

CHAPTER LXVI.

MINES AND MINING CLAIMS 557

CHAPTER LXVII.

MORTGAGE PLEDGE 587

CHAPTER LXVIII.

NEW TRIAL 597

CHAPTER LXIX.

NONSUIT 604

CHAPTER LXX.

NUISANCE 606

CHAPTER LXXI.

OFFICERS 609

Page.

CHAPTER LXXII.

Offset, Counter-claim 610

CHAPTER LXXIII.

Parties to Actions 615

CHAPTER LXXIV.

Parent and Child 624

CHAPTER LXXV.

Payment 627

CHAPTER LXXVI.

Personal Liabilities of Officers 630

CHAPTER LXXVII.

Pleadings 632

CHAPTER LXXVIII.

Release 650

CHAPTER LXXIX.

Summons 651

CHAPTER LXXX.

Summons, Service 655

CHAPTER LXXXI.

Sheriffs 666

CHAPTER LXXXII.

Stoppage In Transitu 707

CHAPTER LXXXIII.

Sundays 708

CHAPTER LXXXIV.

Sureties 709

CHAPTER LXXXV.

Tender 710

CHAPTER LXXXVI.

Time 713

CHAPTER LXXXVII.

Transfer of Action 714

CHAPTER LXXXVIII.

Trespass 717

CHAPTER LXXXIX.

Trial 720

CHAPTER XC.

Trover and Conversion 733

Page.

CHAPTER XCI.

TRUSTS..... 734

CHAPTER XCII.

UNDERTAKING ON BONDS..... 735

CHAPTER XCIII.

USE AND OCCUPATION..... 738

CHAPTER XCIV.

VALUE..... 739

CHAPTER XCV.

VARIANCE..... 740

CHAPTER XCVI.

WARRANTY..... 741

CHAPTER XCVII.

WATER RIGHTS..... 743

CHAPTER XCVIII.

WITNESS..... 754

CHAPTER XCIX.

FEES..... 756

PART SECOND.

CRIMINAL PRACTICE.....[SEE PAGES 776 TO 829.]

JUSTICES' TREATISE.

CHAPTER I.

JUSTICES OF THE PEACE.

Election, Qualification and Term of Office.

SECTION 1. The powers of the government of the state of California are divided by the constitution into three separate departments: the legislative, the executive and judicial. *Gen. Laws*, 112.

SEC. 2. The judicial power is vested in a supreme court, in district courts, in county courts, in probate courts and in justices of the peace, and in such recorders' and other inferior courts as the legislature may establish in any incorporated city or town. *Gen. Laws*, 173.

SEC. 3. The legislature is required to determine the number of justices of the peace to be elected in each city and township of the state. *Gen. Laws*, 181.

SEC. 4. In accordance with the requirements of the constitution, the legislature has provided that there shall be elected for each township, two justices of the peace, except in the city and county of San Francisco there shall be but one justice of the peace for each township. In the city of Sacramento there shall be three justices of the peace elected; in the city of Marysville, two justices of the peace; and for the city of Oakland, one justice of the peace. *Gen. Laws*, 4719.

SEC. 5. Justices of the peace shall be elected by the qualified electors of their respective cities or townships. *Gen. Laws*, 4720.

SEC. 6. Justices of the peace, recorders and other infe-

rior judicial officers, in any incorporated city or town, shall be elected by the qualified electors of their respective townships, cities or towns, at the special judicial elections, and shall hold their offices as provided by law: *provided*, that nothing in this section shall be so construed as to apply to the mayor of any city who shall be judge of a municipal court. *Gen. Laws*, 4729.

SEC. 7. Justices of the peace shall be elected by the electors of their respective townships or cities, at the special elections to be held for the election of justices of the supreme court, and shall hold their offices for two years from the first day of January next following their election. Whenever a vacancy shall occur in the office of a justice, by death, resignation or otherwise, it shall be filled by appointment by the board of supervisors of the county. The person appointed shall hold his office for the unexpired term of his predecessor. *Gen. Laws*, 1284, 4757.

SEC. 8. When any justice of the peace, by the formation of a new township, shall be brought within the limits thereof, he shall be one of the justices of the peace allowed to such new township, and shall continue in office until the expiration of the term for which he was elected. *Gen. Laws*, 4730.

SEC. 9. When, by annexing a part of one township to another, there shall be more than the proper number of justices of the peace within the limits of the township to which addition shall have been made, any justice of the peace brought within such township shall, notwithstanding, hold and exercise his office therein until the expiration of his term of office, but no successor shall be elected after the office becomes vacant, either by the expiration of the term of office of the incumbent or otherwise; and whenever any township, in consequence of any part of it being taken to form a new township or to be annexed to any other township, shall be deprived of its proper number of justices of the peace, the vacancy thus produced shall be supplied as in other cases. *Gen. Laws*, 4731.

SEC. 10. All township officers elected by the people shall receive certificates of election from the officer or officers to whom returns of election are made. *Gen. Laws*, 4733.

SEC. 11. Any officer elected or appointed to fill a vacancy shall be commissioned, or receive a certificate of election or appointment, to such office. *Gen. Laws*, 4734.

SEC. 12. All commissions of officers shall be in the name and by the authority of the people of the state of California, and shall be sealed with the great seal of the state, signed by the governor and countersigned by the secretary of state. *Gen. Laws*, 4732.

SEC. 13. Proof that a party acted as and exercised the office of a justice, is sufficient evidence of his being one, without producing his appointment or commission. 1 *Spencer*, 295.

SEC. 14. Every person elected or appointed to any office of trust or profit, under the authority of this state, before he enters on the duties of his office, shall take and subscribe to the following oath or affirmation: "I do solemnly swear [or, 'affirm,' as the case may be] that I will support the constitution of the United States and the constitution of the state of California, and that I will faithfully discharge the duties of the office of . . ., according to the best of my ability." And such oath shall be indorsed on the commission or certificate of election, or appointment of such office, and signed by him and certified by the officer before whom such oath or affirmation shall have been taken. *Gen. Laws*, 4735.

SEC. 15. The oath shall be taken and may be subscribed before any officer authorized by law to administer oaths, unless otherwise directed by law. *Gen. Laws*, 4738.

SEC. 16. It shall be the duty of every officer whose oath of office is required to be indorsed on his commission or certificate of election, to take and subscribe said oath within ten days after the reception of his said commission or certificate, or within ten days after the commencement of his term of office, if his commission or certificate shall have been received by him. *Gen. Laws*, 4739.

SEC. 17. Each justice, before entering upon the discharge of his duties, shall take the constitutional oath of office, and shall execute a bond to the state, in a sum to be fixed by the board of supervisors of the county, conditioned for the faithful performance of his duties, and file the same with the county clerk. *Gen. Laws*, 1284.

FORM.

Of Official Bond of Justice of the Peace.

Know all men by these presents, that we, A B, as principal, and C D and E F, of, etc., as sureties, are held and firmly bound unto the state of ....., in the penal sum of ..... dollars, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the .... day of .... A.D. 187..

Whereas, the above bounden A B, has been elected to the office of *justice of the peace*, at the last judicial election. Now, therefore, the condition of the above obligation is such, that if the said A B, shall well and truly and faithfully perform and execute the duties of justice of the peace, according to law and according to the requirements of any law to be hereafter enacted, then the above obligation to be void; else to remain in full force.

A B [L.S.]
C D [L.S.]
Signed and sealed in presence of E F [L.S.]

.....

State of California, } ss.
County of ..... }

Personally appeared before me, J K, being authorized to administer an oath—the above named C D and E F, who being by me duly sworn, each for himself, deposes and swears, that he is a resident and freeholder or householder, within said county of ....., and that he is worth the amount for which he becomes surety, to wit: the sum of ..... dollars, over and above all his debts and liabilities, in unincumbered property, situate within said state, which may be levied upon, and is not exempt from execution and forced sale.

C D.
E F.

Sworn to before me, this .... day of ...., A.D. 18...
J K, Justice of the Peace.

[*The above bond, before it is filed with the county clerk, must be approved by the county judge of the county in which the justice elected or appointed is to serve.*]

SEC. 18. A magistrate who is found acting as such, must be presumed to have taken the requisite oath. 4 *Cranch*, 75.

SEC. 19. Every office shall become vacant, upon the happening of either of the following events, before the expiration of the term of such office:

1st. The death or resignation of the incumbent.

2d. The removal of the incumbent from office.

3d. The confirmed insanity of the incumbent, found upon a commission of lunacy issued to determine the fact.

4th. A conviction of the incumbent, of a felony or misdemeanor in office.

5th. A refusal or neglect of the person elected or appointed to take the oath of office, as prescribed in the seventeenth section of this act, or when a bond is required by law, his refusal or neglect to give such bond within the same time in which he is required to take the oath of office.

6th. The ceasing of the incumbent to be a resident of the state, district, county, city or township, in which the duties of his office are to be exercised or for which he shall have been elected or appointed.

7th. The ceasing of the incumbent to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness or absence from the state upon leave, as provided by law.

8th. The decision of a competent tribunal declaring the election or appointment void or the office vacant. *Gen. Laws*, 4741.

SEC. 20. A conviction and judgment for felony against a justice, is a forfeiture of his office, and incapacitates him from ever afterwards acting under his commission; nor does a pardon avoid the forfeiture or restore his capacity. 2 *Leigh*, 724.

SEC. 21. Where a justice maliciously issues a warrant, commanding a person to appear before him and answer the complaint of another person, and adjudged him to pay costs, when, in fact, said complaint was never made to him, it was held that he was guilty of malfeasance, and he was accordingly indicted, fined and removed from office. 2 *Va. Cas.* 130.

SEC. 22. Where a justice had been indicted for drunkenness while in the execution of his official duties, and tried by a jury and found guilty, it was held, that he ought to be removed from his office. 1 *Va. Cas.* 156, 308.

SEC. 23. An indictment does not lie against a justice of the peace for mal-administration; the proceeding is by impeachment. 2 *Tyler*, 177.

SEC. 24. That a removal of a justice from his county may operate to vacate his commission, it must be with the absolute intent to change his place of residence. *C. B. Mon.* 214.

SEC. 25. A temporary removal of a justice from his

county with an intent to stay four months and then return, does not vacate his office. 3 *Bibb*, 430.

SEC. 26. A justice of the county of A left the state with the intent to reside in another state. He remained in another state nine months, but did not establish his permanent residence there. He then returned and resumed his former residence in the county of A, in Virginia: *Held*, that he had no right to resume his office of justice of A. 2 *Leigh*, 743.

SEC. 27. Where a justice forfeits his office by an acceptance of another office, such acceptance does not vacate such of his subsequent acts as may have been done before his disqualification is established by some proper judicial tribunal. 2 *Va. Cas.* 59.

SEC. 28. If a justice, having been legally disqualified to act as such, continue to act in the same capacity after accepting an incompatible office, he will be considered as a justice of the peace, *de facto*, so far as third persons are concerned, and his warrant will justify the officer to whom it is directed in making service thereof. 2 *Cush.* 577.

SEC. 29. The acceptance of the office of constable of a town by a person holding, at the time, the office of justice, is of itself a surrender of the latter office. 25 *Cow.* 565.

CHAPTER II.

JURISDICTION OF JUSTICES.

	SECS.		SECS.
GENERAL RULE AS TO JURISDICTION	1	JUSTICES HAVE JURISDICTION	22–32
AMOUNT IN CONTROVERSY	2–21	TO WHAT ACTIONS JUSTICES' JURISDICTION SHALL NOT EXTEND	33–58
NATURE OF ACTIONS OF WHICH			

General Rule as to Jurisdiction.

SECTION 1. As a general rule, justices have jurisdiction in all cases at law in which the demand, exclusive of interest or the value of the property in controversy, is less than three hundred dollars. Before the late amendments of the constitution, the jurisdiction of justices was limited to all

cases at law or equity where the amount claimed, exclusive of interest, did not exceed two hundred dollars. They are now deprived of all equity jurisdiction. The following decisions referred to, in connection with the law now in force defining the jurisdiction of justices, were rendered in cases arising under the old law when the jurisdiction was limited to two hundred dollars.

Amount in Controversy.

SEC. 2. A justice's court does not necessarily exceed its jurisdiction by rendering a judgment for more than three hundred dollars. The judgment may exceed the amount in controversy, upon which alone the jurisdiction depends. 22 *Cal.* 169.

SEC. 3. A judgment rendered by a justice of the peace for two hundred and nine dollars and seventeen cents, with interest at three per cent. per month, is beyond his jurisdiction. The judgment was, therefore, properly reversed by the county court, but it should have dismissed the case. The reversal of the county court was affirmed, and the cause dismissed from the consideration of the justice. 5 *Cal.* 331.

SEC. 4. The jurisdiction of justices being entirely statutory, as we have already seen, it differs, of course, in the different states, both as to the amount and as to the nature and character of the actions. The following decisions, as to the amount of their jurisdiction in other states, may be found useful. It will readily appear, from the references to the reports, in what states the decisions were rendered.

SEC. 5. If the first count show a case within the jurisdiction, the others may be regarded as only different modes of declaring for the same cause of action. 6 *Vt.* 91.

SEC. 6. Where the plaintiff declares for an indebtedness of one hundred dollars in each of several counts, but in his specification shows a balance of charges and credits of a less sum, a justice has jurisdiction. The amount of the original debt, if reduced by payments, does not affect the jurisdiction. 6 *Vt.* 573.

So, where there are several counts in a declaration which may be for the same subject matter, the aggregate of all of

which exceeds one hundred dollars, yet if the *ad damnum* is but one hundred dollars, he has jurisdiction. 10 *Vt.* 509.

But the *ad damnum* in a writ is taken as a test of apparent jurisdiction, only in cases where the declaration does not otherwise limit the extent of the plaintiff's claim; the excess of the *ad damnum*, beyond the amount within the limit of the jurisdiction, will be treated as unmeaning for any purpose of affecting jurisdiction, if the amount of the judgment sued upon and described in the declaration be within such limit. 22 *Vt.* (7 *Washb.*) 591.

The amount stated in the *ad damnum* being mere matter of form, does not determine whether the justice has jurisdiction or not; that is shown by the amount recovered. 3 *Ala.* 24.

SEC. 7. Where the declaration contained three counts, each claiming fifty dollars, and had no conclusion limiting the amount claimed, it was held that the suit should be dismissed for want of jurisdiction. 5 *Blackf.* 97.

SEC. 8. A justice has not jurisdiction of an action if the amount of the several sums, claimed by several counts, exceed the sum of which he has jurisdiction. 5 *Blackf.* 357.

He cannot take jurisdiction of an action when the plaintiff, in his declaration, demands more than the sum over which the law gives the justice jurisdiction; and it is error for him, after dismissing an action for want of jurisdiction, to issue execution for costs. 1 *Chand.* (*Wis.*) 69.

SEC. 9. Where the jurisdiction was limited to fifty dollars, each count of the declaration had its own conclusion, and in each damages were laid at fifty dollars. It was held, that the plaintiff demanded one hundred dollars damages, and that the suit must be dismissed for want of jurisdiction. 4 *Ind.* 49.

If the plaintiff state his demand at an amount above the sum within the jurisdiction, but claims damages in such sum, the justice has jurisdiction. 9 *Johns.* (*N. Y.*) 366.

SEC. 10. If the defendant file an account in set-off, whereby he claims a balance of more than the amount for which the justice has jurisdiction, his account is to be rejected. 1 *Carter* (*Ind.*) 389.

A justice has jurisdiction of a set-off exceeding one hundred dollars, where the balance claimed by the defendant does not exceed that sum. And it seems that if the balance exceeds that sum, the justice must either allow so much of the note as will set off the plaintiff's claim and give judgment for the defendant for costs, or dismiss the suit altogether. 3 *Scam.* (*Ill.*) 298.

SEC. 11. The division of a note of upwards of one hundred dollars, into several notes of less amount, by the act of the parties, so that judgments may be taken on them before a justice, is not either in fraud or evasion of the statute prescribing his jurisdiction. 2 *Ired.* 63.

In suits under the statutes which authorized him to take jurisdiction, where the amount claimed by any one creditor does not exceed one hundred dollars, it was held that the same creditor might file three separate claims, each amounting to one hundred dollars, with a separate affidavit and bond, and each claim would constitute a single, independent suit, and that the plaintiff would be as to each claim, a separate creditor. 5 *Ind.* (*Porter*) 439.

Where two distinct suits are brought before the same justice, on the same day, upon two demands which might be consolidated into one suit, and which, when thus consolidated, would not exceed one hundred dollars, and one suit is dismissed and judgment is rendered on the other, the proceedings are regular. 1 *Scam.* 152.

SEC. 12. A debtor and a creditor may lawfully change one large debt due by note not within the jurisdiction, to several smaller ones within that jurisdiction. 5 *Yerg.* 297.

One suit may be brought on several notes where neither of the notes is for a greater sum than one hundred dollars, though the aggregate sum of all the notes may exceed that amount. 4 *Eng.* 463.

A justice may have jurisdiction of a suit, though the plaintiff's account exceed one hundred dollars, if it be reduced by credits below that sum, and the balance only be demanded. 3 *Blackf.* 460.

SEC. 13. Though a note filed as a cause of action be, on its face, for a sum beyond a justice's jurisdiction, yet, if the amount actually demanded and recovered be written on it,

the presumption is that the note had been so reduced by credits as to authorize him under the statute to take cognizance of the cause. 6 *Blackf.* 64.

SEC. 14. In actions of *indebitatus assumpsit* and debt upon executed contracts, the plaintiff may relinquish a part of his claim, with a view to give jurisdiction, and recover judgment for the balance. The judgment recovered is a bar to a suit for the part relinquished, if pleaded. 4 *Humph.* 108.

SEC. 15. In an action on an open account, which is all due at the time the suit is brought, amounting to more than fifty dollars, the plaintiff may remit or leave out a sum to reduce the amount to the jurisdiction; but the balance remitted or left out could never be collected. 1 *Chand.* (*Wis.*) 254.

SEC. 16. A creditor may relinquish a part of his claim so as to bring it within the jurisdiction. 2 *Stew.* 487.

Credits given to bring a case within the jurisdiction, must be specifically stated. 1 *Penn.* 206.

Any party has a right to waive a recovery for damages without regard to the purposes which may influence him. And it often happens in courts of record, even after verdict and judgment, that a party is compelled to enter a remittitur of damages in order to conform his recovery to his actual rights; and it is a privilege which is certainly never denied, whether the question is one of jurisdiction or otherwise. 6 *Cal.* 414.

SEC. 17. Where it appears from the account of the plaintiff that he claims less than one hundred dollars, the justice is not ousted of his jurisdiction, though a witness should prove that the plaintiff was entitled to more than one hundred dollars. The plaintiff's own claim must determine the jurisdiction. *Breese*, 263.

SEC. 18. A justice has not jurisdiction of a garnishment where the interrogatories show an indebtedness of the garnishee to the principal defendant, in a sum exceeding one hundred dollars. 5 *Pike*, 214.

SEC. 19. Where an account in set-off exceeds the plaintiff's claim by an amount exceeding the jurisdiction, it should be rejected. 1 *Smith*, 208.

SEC. 20. A defendant need not appear to a summons of a justice, laying damages at one hundred dollars, as he has no jurisdiction. 6 *Hill*, 631.

Objection to the jurisdiction on the ground of excess in the value of the subject of controversy, is properly made by the answer, and that should be first determined before the justice proceeds to hear the merits of the case. 6 *Cal.* 449.

SEC. 21. A defendant should be allowed to prove an allegation in his answer that the thing in controversy exceeds in value the constitutional limit of a justice's jurisdiction. 7 *Cal.* 105.

Nature of Actions of which Justices have Jurisdiction.

SEC. 22. These courts shall have jurisdiction within their respective townships or cities, of the following actions and proceedings:

1st. Of an action arising on contract, for the recovery of money only, if the sum claimed, exclusive of interest, is less than three hundred dollars.

2d. Of an action for damages for injury to the person, or for taking or detaining personal property, or for injury to real or personal property, if the damages claimed are less than three hundred dollars.

3d. Of an action for a fine, penalty or forfeiture, in a sum less than three hundred dollars, given by statute or the ordinance of an incorporated city or town.

4th. Of an action on a bond or undertaking conditioned for the payment of money, in a sum less than three hundred dollars, though the penalty exceed three hundred dollars; the judgment to be given for the sum actually due. When the payments are to be made by installment, an action may be brought for each installment as it becomes due.

5th. Of an action for the foreclosure of any mortgage, or the enforcement of any lien on personal property, when the debt secured is less than three hundred dollars, exclusive of interest.

6th. Of an action to recover possession of personal property, when the value of such property is less than three hundred dollars.

7th. To take and enter judgment on the confession of a

defendant, when the amount confessed is less than three hundred dollars, exclusive of interest.

8th. Of an action to determine the right to a mining claim, when the value of the claim is less than three hundred dollars, and for damages for injury to the same when the damages claimed are less than three hundred dollars.

9th. Of proceedings respecting vagrancy and disorderly persons. *Gen. Laws*, 1279.

SEC. 23. The amount in controversy which, in actions on contract, determines the jurisdiction, is the principal sum sued for, exclusive of costs. 22 *Cal.* 169.

SEC. 24. Justices have jurisdiction of actions upon judgments. A judgment is a contract, and by the statute justices' courts are invested with jurisdiction of actions upon all contracts for the recovery of money, where the amount in dispute does not exceed the constitutional limits. Chitty says that judgments are contracts by specialty, and they are so treated by the authorities generally. 16 *Cal.* 375.

Ames vs. *Hoy* (12 Cal. 375), was an action upon a judgment rendered in this state, and it was held that such an action could be maintained, even though an execution might be issued to enforce the judgment. 16 *Cal.* 375.

SEC. 25. The foreclosure of a mortgage and sale of the mortgaged property for the payment of the debt thereby secured, is a "case in equity," of which the district courts alone can take cognizance. 24 *Cal.* 491.

SEC. 26. In replevin, the value of the property claimed by the declaration, and not by the affidavit, decides as to the jurisdiction of the Court. 3 *Ired.* 548.

SEC. 27. In an action of ejectment, the defendant claimed title by virtue of a purchase at a constable's sale, upon execution issued by a justice against the plaintiff in ejectment for the sum of three hundred and eighteen dollars. The docket of the justice showed that suit was originally commenced for the sum of two hundred dollars, but that the present plaintiff, then defendant, appeared and confessed judgment for three hundred dollars, whereupon judgment was duly entered for three hundred dollars, and eighteen dollars costs.

The supreme court say: Justices cannot entertain suits

for money demands, where the amount in controversy exceeds two [now three] hundred dollars. Consent of parties cannot give a jurisdiction which the constitution denies. It makes no difference whether the judgment was suffered voluntarily or not. It was for all purposes absolutely void, and the execution and sale under it a nullity. 8 *Cal.* 77.

So, where proceedings were commenced to recover a debt less than one hundred dollars, and the defendant confessed judgment for a sum exceeding one hundred dollars, and consequently beyond the justice's jurisdiction, and the amount was paid to the justice without execution issued, it was held that the sureties of the justice were responsible for it to the plaintiff. 8 *Barr*, 415.

SEC. 28. Although the jurisdiction of mining claims is given to justices—that of the district courts remains unaffected if the amount in controversy exceeds two [three] hundred dollars. 3 *Cal.* 224.

SEC. 29. Plaintiffs brought an action in a justice's court to recover possession of a mining claim, and for damages for injuries done thereto by defendants. The defendants answered, and on trial moved to dismiss the action for the reason that two causes of action were improperly united. The justice overruled the motion. The jury found a verdict for defendants, and judgment was entered accordingly, from which plaintiffs appealed to the county court. There the motion to dismiss was renewed and granted, and the action dismissed. Plaintiffs appealed.

The supreme court say: Justices cannot take any jurisdiction by implication. The law gives them authority to try the right to a mining claim where the value does not exceed two hundred dollars, but it confers no jurisdiction to give damages for an injury to a mining claim, or for its detention. But this is not the case. The plaintiff sues for the mining claim—that is the cause of his action. His prayer for damages might have deen stricken out, or might have been disregarded. It ought not to have turned him out of court. The rule is "*Utile per inutile non vitiatur.*" And, besides this, the courts are always gentle and indulgent to pleadings before these inferior tribunals. 6 *Cal.* 19.

SEC. 30. An action was instituted before a justice for the

recovery of a mining claim, and for five hundred dollars damages. The defendants recovered judgment, and plaintiff appealed to the county court. On the case being called for trial in that court, the plaintiff moved to be allowed to amend his complaint by striking out the prayer for damages. This motion being opposed on the part of defendant, was overruled by the court.

On appeal, the supreme court says: Any party has a right to waive a recovery for damages, without regard to the purpose which may influence him. And it often happens in courts of record, even after verdict and judgment, that a party is compelled to enter a remittitur of damages in order to conform his recovery to his actual rights; and it is a privilege which is certainly never denied, whether the question is one of jurisdiction or otherwise. In this case particularly, the plaintiff was right in moving to withdraw his claim for damages, for it has been before held that justices had no jurisdiction of such claims in actions of this character, and a former case was reversed because the ground of its dismissal was a prayer for damages exceeding the jurisdiction of the justice, the court holding that it should have been stricken out or disregarded, and ought not to have turned the party out of court. 6 *Cal.* 413, 414.

SEC. 31. In an action to try the right to a mining claim in a justice's court, the defendant's answer averred that the value of the mining claim in dispute was three hundred dollars, and that the justice had no jurisdiction to try the cause.

On the trial in the county court, the defendant moved to dismiss the action for want of jurisdiction, on the ground that the property in dispute was real property, which motion was overruled. Plaintiff then moved to strike from the answer the allegation that said claim was of the value of three hundred dollars, which motion was sustained, the defendant excepting. Judgment was entered for plaintiff. Defendant moved for a new trial, which being overruled, he appealed.

The supreme court say: The legislature cannot confer on justices any jurisdiction where the amount in controversy exceeds two hundred dollars. There can be no

exception to this rule; and in construing the statute giving them jurisdiction of mining claims, we expressly confine it to such as are of the value of two hundred dollars.

The objection to the jurisdiction of the justice, on the ground of excess in the value of the subject of controversy, was properly made by the answer, and that should have been first determined before he proceeded to hear the merits of the case. 6 *Cal.* 449.

SEC. 32. An action was brought for the recovery of the possession of a mining claim, before a justice, who rendered judgment for defendants. Plaintiffs appealed to the county court, where a trial, *de novo*, was had, and judgment entered for the plaintiffs. On the trial in the county court, the defendants offered to prove one of the allegations in their answer, that the claim in controversy exceeded in value the sum of two hundred dollars, which the court refused to permit them to do. Defendants appealed.

The supreme court say: The jurisdiction of justices is limited by the constitution to cases in which the amount involved does not exceed two hundred dollars. It follows that the court erred in refusing to allow defendants to prove the value of the mining claim, as alleged in their answer. 7 *Cal.* 105.

To what Actions Justices' Jurisdiction shall not extend.

SEC. 33. The jurisdiction conferred by the last section shall not extend, however:

1st. To a civil action in which the title or possession of real property shall necessarily come in question.

2d. Nor to an action or proceeding against ships, vessels, or boats, or against the owners or masters thereof, when the suit or proceeding is for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state. *Gen. Laws*, 1280.

SEC. 34. Has a justice jurisdiction of a cause brought for damages arising from injuries alleged to have been inflicted by the defendants upon the plaintiff, by the partial destruction of mining ditches belonging to the plaintiff, and the wrongful diversion of water into ditches belonging to the defendants?

The jurisdiction of justices embraces actions for damages for taking, detaining and injuring, personal property; and actions for the recovery of personal property, where the value of the property does not exceed the limit to which the court is confined in the exercise of its jurisdiction. Where there is a right to the use of water for mining purposes and the appropriation of it, a diversion of the stream could not be called an injury to personal property, in the meaning of the law. It seems clear, that while the legislature has conferred upon justices jurisdiction of an action to determine the right to mining claims, yet that it never was its intention to confer upon these courts power to hear and determine causes in which there may be conflicts as to the right to the use of water.

The right to running water is defined to be a corporal right or hereditament which follows or is embraced by the ownership of the soil over which it naturally passes. From the policy of our laws, it has been held in this state to exist without private ownership of the soil—upon the ground of prior location upon the land, or prior appropriation and use of the water. The right to water must be treated in this as it has always been treated, as a right running with the land, and as a corporal privilege bestowed upon the occupier or appropriator of the soil; and as such has none of the characteristics of mere personalty. It therefore follows, that a justice has no power conferred upon him to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted. 5 *Cal.* 445, 446; 3 *Harr.* 430.

SEC. 35. In most, if not in all, of the other states there are similar statutory provisions depriving justices of jurisdiction of civil actions in which the title or possession of real property shall necessarily come in question. The following decisions in other states are, therefore, inserted here. In what states they were rendered will be seen by the references to the reports:

SEC. 36. Where the complaint is so drawn that the defendant can set up title in his answer, and on giving his requisite security, oust the justice of his jurisdiction, but

omits to do so, the justice retains his jurisdiction, and the defendant will be precluded from drawing it in question, on the trial. 11 *Barb. Sup. Ct.* 390.

So, in an action to recover penalties for passing a toll-gate without paying the tolls, if the defendant intends to raise the question of title, he should set forth in his answer the matter showing that title will come in question, and should give the undertaking. If he does not do so, the justice has jurisdiction of the cause, and the defendant is precluded in his defense from drawing the title in question. 27 *Barb.* (*N. Y.*) 214.

SEC. 37. In an action, for disturbing a right of way, the defendant having established the title of the plaintiff by his own evidence, and having answered by a general denial, the title to real estate cannot be said to come in question so as to oust a justice's court from jurisdiction. 1 *E. D. Smith* (*N. Y.*) 402.

A contract for coal or stone is not a real contract, and an action for the price of such articles is within his jurisdiction. 27 *Penn. State R.* 323.

SEC. 38. Where title to real estate is not pleaded, he is not ousted of his jurisdiction, because it may be necessary to prove title, unless such title shall be disputed by the defendant. 15 *Barb.* 96.

SEC. 39. An agreement to remove a fence and open a road to its original width, has no reference to the title to land, so as to take it out of his jurisdiction. 10 *Johns.* 109.

SEC. 40. In an action of trespass on land, the plea of title comes too late, after pleading the general issue demanding a jury and obtaining an adjournment. 15 *Johns.* 304.

A plea of title and a compliance with the requirements of the statute in such cases, does not oust him of jurisdiction, in an action of debt for a penalty for not removing an obstruction in a highway. It is his duty to decide whether such plea, when put in, is appropriate to the action prosecuted before him. 7 *Wend.* 291.

SEC. 41. Where, in an action on the case for obstructing a river, the plaintiff claims that such river was a public highway at common law, and has been declared such by

statute, without making any other proof of his right, and no fact is shown by the defendant to controvert the right thus declared by law, but he pleads the general issue and introduces in evidence a grant from the legislature authorizing him to erect and maintain a dam across the river of such construction as not to interfere with the public right of passage, the title to land does not come in question so as to oust the justice of his jurisdiction to try the cause. 8 *Barb. Sup. Ct.* 239.

The production of such a grant, by the defendant, is evidence that he holds in subserviency to the public right of passage, if it does not estop him from asserting the contrary. 8 *Barb. Sup. Ct.* 239.

The questions in issue in a such case, namely: whether the defendant has obstructed the navigation of the river, and if so, whether the plaintiff has suffered injury thereby, are such as a justice may lawfully try. 8 *Barb. Sup. Ct.* 239.

SEC. 42. He has jurisdiction in an action for the use and occupation of land, where the title to the land does not come in controversy, although there may have been no express agreement or contract for rent. 3 *Eng.* 118.

So where the title to real estate is admitted as by demurrer to a declaration alleging it. 2 *Doug.* 184.

So also of an action of trespass on the case brought against a town to recover for injuries alleged to have been sustained by reason of the insufficiency of a highway, which the town were bound to maintain, where the damages claimed are less than one hundred dollars, unless the defendants interpose such a plea as directly puts in issue the right of way. 19 *Vt.* (4 *Washb.*) 223.

SEC. 43. To a suit on a promissory note, a plea that the note was given in consideration that the payee would convey land to the defendant, that the payee had no title to the certain land and that he had failed to make the deed, does not oust the justice of jurisdiction. 7 *Blackf.* 302.

A justice may try a question of actual possession of land. 6 *Hill*, 537.

Question not being a question of title, within the meaning of the statute. 27 *Barb.* (*N. Y.*) 214.

A justice has jurisdiction in a suit brought by an indorsee on a promissory note, though land is the consideration of the note. 5 *Watts*, 482.

SEC. 44. An action of covenant broken on a deed to convey land in which a breach is assigned that the defendant was not seized or had no right to convey the land, brings the title to real estate directly in question, and is therefore not within the jurisdiction. 2 *Mass.* 455, 462, *note.*

SEC. 45. A question as to a private right of way affects the title to lands, and therefore is not within the jurisdiction. 2 *Dutch.* (*N. J.*) 308; 1 *Harr.* 226.

Neither can a justice try a question of title to a highway. 2 *Root.* 54; 19 *Vt.* (4 *Washb.*) 223.

Where the title to land is concerned in an action, and the justice consequently has no jurisdiction, it is a defect which may be taken advantage of at any time during the pendency of the action. 26 *Vt.* (3 *Deane*) 491.

SEC. 46. The rule with respect to the justice's jurisdiction in trespass is, that when the nature of the action is such that, in order to maintain it, the plaintiff must necessarily show on his part whatever may be the defense, something more than the *pedis possessio*, the mere actual occupation, and must give some evidence of title strictly so called, the action is not cognizable in a justice's court; but where the plaintiff need give evidence of no more besides the commission of the alleged trespass than of the mere possession, the action is cognizable and may proceed to judgment, unless the defendant shall interpose a plea of title, and thereby, under the statute, suspend the jurisdiction. 6 *Halst.* 62, 164.

SEC. 47. If a plaintiff, in order to sustain his action, is obliged to rely upon and prove a possessory title, even to premises described in his declaration, a justice has no jurisdiction of the suit. 20 *Vt.* (5 *Washb.*) 183.

SEC. 48. The term "land," as used in the exception to the statute giving jurisdiction to justices, is sufficiently comprehensive to include a right of way over the real estate of another, whether held by the public or an individual. 19 *Vt.* (4 *Washb.*) 223.

But a justice is not excluded from taking jurisdiction of

an action, merely because, under the plea of the general issue or a plea in bar, the title of land may be drawn into controversy, but only when the action necessarily involves such an inquiry as ejectment and other real actions, or when, by the course of pleading, the title to land is actually contested. 19 *Vt.* (4 *Washb.*) 223.

He is not divested of his jurisdiction over the case in all respects: he still retains the power to act on a motion to waive or amend the plea, or to amend the declaration, or to new assign; and if the pleadings, as definitely fixed by the parties, do not present a question of title to real estate, he should proceed to try the cause. 19 *Pick.* 419, 422, *note*, 167.

He has no jurisdiction in an action of trespass *quare clausum*, where the defendant justifies on the ground that the *locus in quo* is a highway. 19 *Wend.* 373; 6 *Hill*, 342.

Nor in an action for damages by overflowing the plaintiff's land. 3 *Harr.* 430; 2 *South.* 507.

SEC. 49. The judgment given in a case where the title to land plainly comes in question, is not void for want of jurisdiction, but voidable for error. 6 *Hill*, 44.

He has no more authority to judge of the plea of a title on demurrer than on the merits. 2 *Root*, 359.

To entitle a defendant to a dismissal of a cause, pending before a justice, on the ground that the title to land comes in question, he must call the justice's attention specifically to the objection, by at least disputing the title of the plaintiff. 8 *Barb. Sup. Ct.* 239.

Where the title to land is concerned in an action, and the justice consequently has no jurisdiction, it is a defect which may be taken advantage of at any time during the pendency of the action. 26 *Vt.* (3 *Deane*) 491.

CHAPTER III.

CONTRACTS IN GENERAL.

SECTION 1. The statute gives to justices of the peace jurisdiction of actions arising on contracts for the payment of money only. In this class of actions is included every claim

of money owing, whether the claim is upon a written instrument or a promissory note, or any other obligation, in writing, to pay money, or whether the claim arises upon promises to pay, not in writing, as for the price of goods sold or for the value of services performed, at the request of another. Nor is it necessary that the price of the goods or the value of the services be agreed between the parties.

The party at whose instance the goods are sold or services rendered, must pay to the party selling the goods or rendering the services their value in money, to be determined by proof in the absence of an agreement. This rule asises from a plain and obvious necessity, that unless the contrary can be proved, it must be assumed that whenever a state of facts exists which makes it the duty of a party to pay money, he is supposed to have contracted to pay it. The statute says: "on contract for the payment of *money only*." From this language it is manifest that a justice can render a judgment for money only. If, therefore, a note is given payable in wheat, or potatoes or other article not money, and is not paid at the time agreed upon in the article promised, the contract then becomes one to pay the value of such article in money. If the claim be not less than three hundred dollars, a justice cannot entertain jurisdiction of it. If, however, the plaintiff only demand judgment for a sum less than three hundred dollars, exclusive of interest, if the demand draws interest he may act, although there be more than that sum due upon the contract. *Freeman* vs. *Powers*, 7 Cal. 104.

SEC. 2. There are three classes of contracts: 1st. *Contracts of record*, such as judgments. 2d. *Specialties* or sealed contracts, as deeds, covenants and bonds; and 3d. *Simple contracts*, in which are included all contracts or agreements not under seal, whether they be in writing or mere verbal promises. Contracts not under seal, are called *parol* contracts or parol agreements, though they be in writing. *Cowen's Treatise*, 40.

SEC. 3. Mutual agreement of the parties to a contract is necessary to its validity. The judgment or decree of a court, is a mutual agreement in law, founded upon the principle that the parties to the action agree to abide the judgment

or decree of the court into which they have gone for the settlement of their claims. The law assumes, that a husband has contracted to pay for necessaries furnished to his wife or his child, whom he *wrongfully* drives from his house, although he may have published a notice that he will not pay for their support. If one party avails himself of the labor or services of another, the law presumes he will pay for it what it is worth. So, if one buys goods or other thing, without stipulating its price, the law assumes that he agrees to pay to the vendor its value. *Chitty on Contracts*, 21–23.

SEC. 4. No contract is valid unless it is founded on a sufficient and lawful consideration. A promise to pay, even if it be in writing, is not binding on the promisor, unless something is given to or done for the promisor as a consideration for his promise. Any consideration, however trifling, is sufficient in law to prevent the agreement to pay from being void. A moral obligation alone is not sufficient. But if a legal or equitable obligation ever existed, though it may have become barred by operation of law, as by an insolvent's discharge or by the statute of limitation, a subsequent promise by the party, in writing, will be sufficient. The consideration must be a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. For instance: If A promises B to pay him a sum of money if he will not sue him within a given time, on a claim justly due to B, the promise is good. So also is a promise to pay a compensation for any damage or forbearance for a certain length of time. *Chitty on Contracts*, 25–27.

SEC. 5. A past consideration will not support a promise to pay, unless such past consideration was performed at the request of the party promising; but if the consideration was of a beneficial nature to the party promising, a request may be inferred. *Chitty on Contracts*, Sec. 57.

SEC. 6. A promise made in writing, under seal, though the words "for value received" do not appear in the instrument, implies a consideration. *Frank* vs. *Green*, 5 Bar. 455.

SEC. 7. *In writing, not under seal*—A promise in writing, not under seal, does not imply a consideration, unless the words "for value received" are written in the instrument;

and if suit be brought on a promissory note in which those words are not written, the consideration must be proved; for unless there was a consideration the promise, though in writing, is void. In California, such promise, in writing, is *prima facie* evidence of consideration. *Stewart* vs. *Street*, 10 Cal. 372.

SEC. 8. *In writing, under seal*—It has been decided in New York (16 *Wend.* 460) that if a promise to pay money be written, and under seal, and in that written promise the words "value received" consideration is expressed in the instrument, the party giving the promise is *estopped* by the seal from denying the consideration. 16 *Wend.* 460.

SEC. 9. *Considerations giving validity to contracts are reducible to three heads:* 1st. When the parties mutually agree to give something. This comprehends sales, exchanges, loans and the like. 2d. Where the parties mutually agree to do or forbear to do something, as in consideration that if *you* will drive my cart, I will reap *your* grain; or, in consideration that *you* will not open a hotel in such a place, so as to interfere with A's hotel, *I* will not keep open *my* store at this other place so as to interfere with B's store. 3d. Where parties mutually agree, the one to perform work or transact any particular business for the other, if that other will give him something for it: as, if one agrees to work by the month, at a particular price per month; or if no particular compensation be agreed on by the parties, the law implies that the laborer shall receive as much as his work was reasonably worth, to be left to the determination of the justice trying the cause, or to a jury, to find its value. *Chitty on Contracts*, 27–29; *Cowen's Treatise*, 42.

SEC. 10. Contracts are either *express* or *implied*. Express contracts, are when all the terms are fixed and agreed to by the parties, either in writing or orally. Implied contracts, are such as have not been distinctly fixed by the parties. And where the acts of the parties justify such an inference, as if a parent shall unlawfully force his infant child into the street, and another shall take it to his house and nurture it, the law infers a contract on the part of the parent to pay as much as such care was reasonably worth. *Abbott* vs. *Hermon*, 7 Greenl. 118.

SEC. 11. Express contracts may be made by all persons not incompetent by personal disability or by considerations of public policy. Idiots, lunatics, persons of unsound mind, and persons so intoxicated, as to be devoid of ability to mentally comprehend the terms of a contract, cannot make a contract by reason of personal disability. Alien enemies, infants, and, with certain exceptions, married women cannot contract by reason of public policy. *Chitty on Contracts*, 131–133.

SEC. 12. Idiots and lunatics, though not liable upon an express contract, are nevertheless responsible for necessaries furnished them. Lunatics are liable for articles purchased by them, before their lunacy has been legally established by a commission: *provided*, the party furnishing the articles was not at the time, aware of the fact of their lunacy. They are at any time answerable in damages by them committed upon another whether before or after their condition of mind is ascertained by a proper commission. When an idiot is sued for necessaries furnished him, the justice should appoint some person to act as committee for him and assist in his defense. A lunatic or idiot, who has lucid intervals, may make binding contracts, but it is obligatory on the plaintiff to prove, in a suit against him, that his intellect was unclouded and clear when he made the contract. Weakness of understanding will not, of itself, avoid a contract, yet courts should be very jealous of the rights of such persons to see that no fraud or imposition has been practiced upon them; and if it can be shown that undue and improper advantages have been taken in the contract, a court of law will avoid the contract for fraud. *Shelf on Lunacy*, 395; 24 *Wardel*, 85; 1 *Hill*, 97; 4 *Cow.* 207.

SEC. 13. *Lunatic*—Where it has been ascertained by an inquisition taken before the county judge and two graduate physicians, that a person is a lunatic; or where after legal notice and proper evidence it shall appear to the probate judge of the county, that a person is of unsound mind from any cause, whether from lunacy, natural idiocy or extreme old age, it is made the duty of the probate judge to appoint a suitable person to take charge of his person and property; and all contracts pertaining to the interests of said person

must be made by and through such appointee. *Cowen's Treatise*, 43; 15 *Johns.* 503.

SEC. 14. *Alien enemies*, or citizens of a foreign country with whom our country is at war. Their contracts are void, unless they reside at the time in this country; if residents, their contracts are valid, though they owe allegiance to the enemy. 1 *Kent's Com.* 66, 69; *Story on Cont.* Sec. 34.

SEC. 15. *Infants* cannot make an *express contract* so as to bind themselves. Their contracts are not absolutely void, but voidable at their election. If an infant make a contract with an adult, the adult is bound, unless the infant or his guardian chose to regard it as a nullity. They are bound on implied contracts for necessaries, suited to their condition, such as board, clothing and tuition; and if an infant have a family, he is bound for necessaries for his family. An infant can only be bound to pay the actual value of necessaries furnished, even if he promised to pay more. To recover on a contract with an infant, it must be proved that the subject of contract was necessary, its actual value and that it was really furnished. An infant is not liable for a breach of promise, but may enforce a promise against an adult. He is not bound for money lent him to purchase necessaries; nor can he bind himself on a promissory note, bill of exchange, balance on a settlement or a written contract. He can bring an action for an injury or upon contract, yet if he settles it, the settlement does not bind him, because he cannot contract; but if he should receive anything in settlement for injuries, it may be proved in mitigation of damages. After an infant becomes of age, he may confirm a contract made during minority and bind himself to perform it, but he must do it by a distinct promise, in writing. 3 *Wend.* 479; *Cowen's Treatise*, 45; *Com. on Cont.* 157.

SEC. 16. *Policy*—Any contract which contravenes the policy of the common law, or is in violation of a statute, is void—*the consideration of all contracts must be lawful.* It is a good defense to any contract to show that the consideration was illegal. Even if it be in writing or under seal, notwithstanding the general rule that parol evidence cannot be admitted, to contradict, add to or vary, the provisions of a written instrument, the consideration may be shown to be

illegal by parol evidence, if plead in defense. It must, however, be remembered, that the presumptions of law are in favor of agreements, and when the instrument admits of two interpretations, one of which is in favor of its legality, and the other opposed to it, that which is in favor of it will be preferred. In all cases, the illegality must be distinctly shown. *Bingham on Infancy*, Bennett's Edition; *Chitty on Cont.* 513, 514.

SEC. 17. Although a contract based upon a consideration which is illegal, is void, yet a contract to indemnify one against injuries sustained by an unlawful act already done, is valid. A contract with a man to engage in a fight is illegal, yet if two men have fought, and one sustains an injury, for which the other contracts to pay him a sum of money as an indemnity for the injury inflicted, such contract is valid. Contracts to pay for past seduction or past cohabitation, are valid, being intended to redress the injury already suffered. *Pothier on Oblig., note*, 43–45.

SEC. 18. It is against public policy to contract in restraint of marriage or in restraint of trade, and such contracts are void because against the policy of the law. Contracts in restraint of trade are against public policy, yet if a contract to restrain trade is confined to a particular kind of trade, at a particular place and of limited extent, it forms an exception; because though it imposes a restraint on one party, it is beneficial to the other. *Cowen's Treatise*, 481.

It is to be remembered that if a contract or agreement be entered into by parties resident at the time elsewhere than in the state of California, and the contract was lawful in the state where it was made, that contract will be enforced. This is upon the principle that the laws of the place where the contract was made, govern the parties to it wherever they may afterwards go. *Cowen's Treatise*, 220.

SEC. 19. *Imprisonment or duress*—A party is not bound by a contract or promise to pay money, which he has been forced to enter into by duress of imprisonment or of threats. Free consent, and ability to consent or refuse, is equally necessary to the validity of a contract. Duress by imprisonment, makes void all contracts, however good the consideration would otherwise be. If, however, the imprisonment

be lawful, the contract will be valid, unless such undue influence or force is used, as may be supposed by the court would overcome a man of ordinary firmness. Duress by threats, is where a man is threatened with loss of life, or of limb, or mayhem or unlawful imprisonment. The threat of an injury which may be compensated in damages forms an exception. 6 *Mass.* 506; *Story on Cont.* 88–90.

SEC. 20. *Fraud*—Every description of contract is vitiated by fraud or deceit practiced by one of the parties to it, and may be avoided by the party imposed on. A man cannot avail himself even of a statute to practice fraud; and all acts, as well judicial as others, which of themselves are just and lawful, yet if mixed with fraud and deceit are, in judgment of law, wrongful and unlawful. For instance: If a third party should claim a horse, really his own property, and sue for him and recover him from one who purchased him in good faith as the property of another; if it can be shown, that he permitted his horse to be sold that he might bring suit to recover him, the judgment can be avoided. Whenever a party is induced in any false manner to do an act which otherwise he would not have done, he may relieve himself by showing the fact. 6 *Johns.* 110; 12 *Johns.* 469.

SEC. 21. If two persons combine to commit a fraud, as if one, for a merely nominal consideration permits another to take his property, to save it from seizure by his creditors though void as to the creditors, it is made binding between them. *Montgomery* vs. *Hunt*, 5 Cal. 368.

SEC. 22. Contracts relating to the sale or exchange of property—to bailments, and those from which a debt arises as for work and labor, are the most common. *Cowen's Treatise*, 58.

SEC. 23. A transmutation of property in consideration of some price or other thing, is called sale or exchange. If A offer B a price for his horse which B accepts, and in consideration thereof delivers A his horse, it is a sale. If A gives to B his horse in consideration that B will give to him his mule, it is an exchange. In either case, the seller is called the vendor, and the buyer is called the vendee. 2 *Denio*, 136.

SEC. 24. As between the vendor and vendee, the title to

the goods is changed when any portion of the purchase money is paid, or any portion of the article purchased is delivered, and from and after that time the vendor may bring an action for the purchase money, or the vendee may recover the goods. *Cowen's Treatise*, 58, 59.

SEC. 25. When goods are sold on a credit and nothing is agreed upon as to the time of delivering, the vendee is entitled to the immediate possession, and the right of possession and the title of the property vest immediately in him. But if, by the contract of sale, any act remains to be done before the terms of sale are performed, the contract is not complete until that thing is done. *Cowen's Treatise*, 58, 59.

SEC. 26. The person in possession of personal property is deemed the owner of it, and it is liable to seizure by his creditors. A sale of personal property, therefore, to be valid against the claims of creditors, must be accompanied by an actual and continued change of possession. *Whitney* vs. *Stark*, 8 Cal. 517.

SEC. 27. Where purchasers from a common vendor are equally innocent or equally at fault, the first purchaser is entitled to the goods. *Vance* vs. *Boynton*, 8 Cal. 560.

SEC. 28. Contracts for the sale of goods, chattels or things in action, for the price of two hundred dollars and over, are void; in other words, there is no contract which binds either party, unless: 1st. A note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby (or their authorized agent); or, 2d. Unless the buyer shall accept and receive part of such goods, or the evidences or some of them, of such things in action; or, 3d. Unless the buyer shall at the time pay some part of the purchase money. *Public Laws, Hittell*, 3157, Sec. 13.

SEC. 29. Contracts to deliver a thing at a future day which thing does not yet exist, as for instance something to be made, are held not to be within the rule laid down in the proceeding, but are as contracts for work and labor. 18 *Johns.* 58.

But when the thing sold exists, the mere fact that something is to be done to it before it is delivered, forms no exception to the rule. So, where a person sells his wheat and

agrees to deliver it after it is threshed, must be in writing to be binding. 23 *Wend.* 270.

SEC. 30. A note or memorandum, in writing, must be signed by both parties, or by some one for them who has authority so to do, or they will not be bound. 26 *Wend.* 341.

It is not sufficient that the names are inserted in the body of the writing, they must be signed at the bottom of it. If the signing be done by the vendor alone it will bind him. The following form is sufficient to bind the vendor:

JANUARY 31st, 1870.

I have sold to B. one wagon..... $250.

(Signed) A.

SEC. 31. An auctioneer is an agent for both seller and buyer, and when he knocks down the goods, the sale is complete. The entry in his book of sales, describing the nature or kind of goods sold, their price and the terms of sale, and the name of the purchaser, and the name of the person on whose account the goods are sold, shall be deemed the note or memorandum of the contract. *Gen. Laws, Hittell,* Sec. 3158.

But the entry must be made at the time and place of sale. It is not enough that a minute be made at the time of the sums bid, and the name of the bidder, although the other entries be made shortly after at another place. 12 *Wend.* 548.

SEC. 32. The acceptance of part of the goods by the purchaser or the *delivery* to him may be either actual or constructive, or inferred from circumstances. As, where they are in a house and the key is delivered to him; or where they are in the possession of a third person, who has receipted for them, and the receipt is delivered to him. 5 *Johns.* 335.

SEC. 33. An actual delivery is sometimes inferred by the courts. As, where A sells to B a yoke of oxen, which are distant from them in a stable or in a field; and sometime after the purchase, there being no money paid or note of the sale made, B takes the oxen away; it was held, there was a delivery, and B was chargeable with the price. Or, where horses are purchased, and the purchaser says: "Here,

keep them for me, until I can send for them," the taking of the horses to keep by the vendor, implies a previous delivery to the purchaser. 1 *East.* 192; *Cowen's Treatise*, Sec. 96.

SEC. 34. Property sold may have been received by the purchaser, and still the sale is not complete: as, where at an auction sale for *cash*, the purchaser bids off an article; it is handed to him by the auctioneer and the purchaser receives it, but does not pay for it—in such case the delivery is said to be conditional, and the title to the property is not changed. *Cowen's Treatise*, 61, 62.

CHAPTER IV.

CONTRACTS PARTICULARIZED, WHAT CONSTITUTES, ETC.

	SECS.		SECS.
WHAT CONSTITUTES A CONTRACT	1– 6	INTERPRETATION AND CONSTRUCTION OF	49–56
ASSENT	7– 8	SEALED CONTRACTS	57–60
CONSIDERATION	9–19	CONTRACTS WITH THE STATE	61
CONTRACTS AGAINST PUBLIC POLICY AND THOSE THAT ARE FRAUDULENT	20–37	CONTRACTS WITH EXECUTORS AND ADMINISTRATORS	62–63
EXECUTION OF CONTRACT	38–42	CONTRACTS OF CORPORATIONS	64–70
MODIFICATION OF CONTRACT	43–45	RESCISSION OF CONTRACT	71–73
ENTIRETY OF CONTRACT	46–48	PERFORMANCE OF CONTRACT	74–88

What Constitutes a Contract.

SECTION 1. A contract is a voluntary agreement between competent parties, upon a good consideration, to do or not to do some particular thing which may be lawfully done or omitted; and it makes no difference whether the subject matter of the contract be real or personal estate; the contract is still good whether verbal or written, unless some positive law provide otherwise. 10 *Cal.* 166.

SEC. 2. A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing. The only end and object of the contract is the doing or the not doing of the particular thing mentioned. The practical result is the only end aimed at by the parties, and the obligation of the contract is the vital

binding element that secures this practical consummation. 9 *Cal.* 83.

SEC. 3. All men are presumed to know the law: and the law then existing enters into, and forms a part of, the contract, without any express stipulation to that effect. Parties, in entering into contracts, only expressly stipulate as to matters that cannot appear without such stipulation. It would be idle for them to say, expressly, that they incorporate in their agreement the law then existing. 9 *Cal.* 84.

As the law enters into the contract and forms a part of it, the obligation of such contract must depend upon the law existing at the time the contract was made. The rights as well as the intentions of the parties are fixed and ascertained by the existing law. 9 *Cal.* 84; 16 *Cal.* 32, 33.

The obligation of a contract, consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence, any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. 16 *Cal.* 31, 32.

The same constitutional inhibition which protects contracts between individuals from being impaired by the legislature extends to contracts between individuals and the state. The principles laid down in *Fletcher* vs. *Peck* (6 Cranch, 87), says Mr. Justice Washington in the opinion in *Green* vs. *Biddle*, from which we have already cited, "are that the constitution of the United States embraces all contracts,

executed or executory, whether between individuals or between a state and individuals, and that a state has no more power to impair an obligation into which she herself has entered than she can the contracts of individuals."

"It is immaterial," observes Mr. Smith, in his Commentaries on Statute and Constitutional Law, "whether the contract be one between a state and an individual, or between individuals only, the contracting parties, whoever they may be, stand in this respect upon the same ground. The obligations imposed and the rights acquired by virtue of the contract cannot be impaired by a legislative act." *Coms.* Sec. 252; *Providence Bank* vs. *Billings et al.*, 4 Peters, 514; *Dartmouth College* vs. *Woodward*, 4 Wheat. 518; *Green* vs. *Biddle*, 8 Wheat. 1; 16 *Cal.* 30.

SEC. 4. Where a contract is made and executed in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is a part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made. 21 *Cal.* 115.

SEC. 5. At common law, all contracts by which one obliged himself to do an act or omission tending to injure the public, were void, and the general rule is that contracts in restraint of trade are contrary to public policy. The stringency of this rule has been gradually relaxed as the reason for it—the security of mechanics and tradesmen—ceased. 6 *Cal.* 261.

Thus, an agreement not to run a stage coach on a certain road is valid. So, where a party enters into a bond, under a penalty, that he will not at any time thereafter own, run or be interested, in any line of boats on a certain canal, the bond is valid. 6 *Cal.* 261.

In these cases, the doctrine is, that there must be not only a consideration for the contract, but there must be some good reason for entering into it; and it must impose no restraint upon one party which is not beneficial to the other. 6 *Cal.* 262.

A contract not to run boats on a certain line of travel at

any time within three years from the date of the contract and on failure to comply with the contract to pay a specified sum of money, is not void, as being against public policy and in restraint of trade, where a consideration is paid therefor. 6 *Cal.* 262.

Such a contract is no monopoly, because it only licenses a party in the exclusive enjoyment of his business as against a single individual, while all the world besides are left at full liberty to enter upon the same enterprise. 6 *Cal.* 262.

SEC. 6. A judgment is a contract in the highest sense of the term, and the word "contract," as used in the amendment to the civil practice act, providing for the rendition of judgment payable in the kind of money specified in the contract, includes judgments. 6 *Cal.* 372; 27 *Cal.* 498.

Assent.

SEC. 7. If A promises B to pay him a sum of money, if he will do a particular act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. 22 *Cal.* 86.

SEC. 8. Contract to pay for goods furnished another: S contracted in writing with W to run a tunnel towards a quartz ledge, and agreed if W could not reach the ledge he would pay W the expense he incurred for provisions. S then told V that if he would furnish W with provisions he would pay for them if W did not reach the ledge: *Held*, that S was liable to V for provisions thus furnished to W. 36 *Cal.* 571.

Consideration.

SEC. 9. There is a settled legal definition of the different kinds of consideration. A good consideration, is such as that of blood or of natural affection. A valuable consideration, is such as money or the like. Deeds made upon a good consideration only are considered as merely voluntary, and are frequently set aside in favor of creditors and *bona fide* purchasers. When the statute speaks of a purchaser "in good faith and for a valuable consideration," there is no reason to suppose it was intended to employ these terms in this connection as a tautologous expression. The intent is that the purchase must not only be in good faith, but it

must be founded on a valuable consideration, as distinguished from a merely good consideration. In other words, that a voluntary deed, although taken in good faith and first recorded, will not have preference over a prior deed. The mode in which the terms are connected indicates the intent with which the latter was used. In good faith *and* for a valuable consideration. The inadequacy of price is a circumstance proper to be considered in determining the question of good faith, but it will not the less fall within the legal definition of a valuable consideration, however disproportioned it may be to the value of the land. 20 *Cal.* 224.

SEC. 10. In order to constitute a consideration, it is necessary that some advantage to promisor, or injury to promisee—the degree not material—should occur. A past and executed consideration is not sufficient. If the debt of A already has been created, the mere promise to pay it by B—no term being introduced into the contract—as delay or the like, is not binding. It is a mere undertaking to pay another's debt, and it is within the statute of frauds, and without the statute would be void, as without consideration. 12 *Cal.* 288, 289.

SEC. 11. Paying part of a note when all is due, is no consideration for an agreement to extend the time of payment. 13 *Cal.* 598.

SEC. 12. A written contract to pay more than ten per cent. per annum as interest, on an indebtedness incurred prior to the contract, is void for want of consideration as to the excess of interest up to the date of the contract. 6 *Cal.* 126.

The indebtedness, being only for the principal and legal interest, is not sufficient to support a contract to pay a greater amount than was due. It is a voluntary undertaking, and cannot be enforced 6 *Cal.* 126.

But a contract to pay in future a greater than legal interest on an existing indebtedness is binding, the forbearance of the creditor being a sufficient consideration. 6 *Cal.* 126.

SEC. 13. An agreement between a debtor and a single creditor for the acceptance by the latter of an amount less than the debt in satisfaction, is invalid for want of consideration; but such an agreement between a debtor and two or

more creditors is valid, the engagement of one being a sufficient consideration for that of the others. 21 *Cal.* 122.

SEC. 14. A contract, purporting to be between several parties, containing mutual covenants, of which those of one party are the consideration of those of the others, must, to be valid, be executed by all, and cannot be enforced against one executing, by another who fails to execute. 21 *Cal.* 60.

Cases, in which instruments have been held inoperative, when not executed by all the parties, are cases in which, from the terms of the instrument or from the nature of the subject matter of the contract, it appeared that it was the intention of the partie swho signed to be bound, without reference to an execution by all the parties, or where, by acting under it with a knowledge that it had not been fully executed, the parties had become estopped from denying its obligation upon them. 21 *Cal.* 69.

If A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B, at the time of the promise, does not engage to do the act. In the intermediate time the obligation of the contract or promise is suspended; for, until the performance of the condition of the promise, there is no consideration, and the promise is *nudum pactum;* but on the performance of the condition of the promise, it is clothed with a valid consideration which relates back to the promise, and it then becomes obligatory. 22 *Cal.* 93, 94.

SEC. 15. An express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. 2 *Cal.* 581.

SEC. 16. In an action for personal services, defendants asked an instruction to the effect that if the plaintiff served the defendant upon an understanding that he was to have only his living—board, washing, lodging, etc.—as a compensation, and that he had received these, then defendant should recover, which instruction the court refused: it was held, that the instruction was proper, and that for the error

in refusing it the judgment for plaintiff must be reversed. 22 *Cal.* 509.

SEC. 17. Where services are rendered upon an understanding that the remuneration is to be at the entire discretion of the employer, no action is maintainable. If services are rendered in expectation of a legacy, without any contract, no action can be maintained for them. 22 *Cal.* 510.

SEC. 18. Where services were originally rendered gratuitously, they cannot afterwards be converted into a charge. A court will not permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand. Where one works for another, the law in general implies a promise to pay what the work is worth, but that implication does not arise in favor of a son who continues with his father's family after he attains his majority, without agreement for his wages; nor in favor of a man who marries a daughter, and lives with her in his father-in-law's family; or in favor of a daughter who thus remains with her parents, or those who stand in place of her parents. As a general rule, she would be considered as a visitor, not entitled to pay for her services, or liable to pay for her board. So, a woman who has lived with a man as his wife, supposing herself to be such, cannot, on discovering that the marriage between them was void, recover for her services, upon an implied promise. When work is done by one for the benefit of another, with his knowledge or approbation, the law will imply a promise to pay for it, unless it appear that there was an understanding that no compensation should be given; but where there is such an understanding, the law will not imply a promise, and such understanding may be implied from circumstances. 22 *Cal.* 510, 511.

SEC. 19. The law imports a consideration to a sealed instrument from its seal. At common law, a party was not permitted to plead a want of consideration as a defense to an action upon a sealed instrument—the presumption of the existence of a consideration being absolute and conclusive. The statute of this state has modified the rule in this respect so far as to permit the want of consideration to be pleaded. It has not, however, altered the presumption which

still accompanies the instrument, but allows it to be rebutted in the answer. 10 *Cal.* 463, 464.

Contracts against Public Policy.

SEC. 20. If the purchaser of a steamboat, at the time of the purchase, covenants with the seller that he will not run or employ or suffer to run or be employed, the said boat for ten years, upon any of the routes of travel of the waters of a state, the covenant, being in restraint of trade and commerce, is void, as against public policy. 36 *Cal.* 342.

SEC. 21. A verbal agreement to indemnify a sheriff for seizing certain property, under an execution in favor of the obligor, is valid, especially where the sheriff appears to have acted in good faith, and with no other view than that of obtaining satisfaction of the execution out of the property of the judgment debtor; and the act committed amounted simply to an unintentional wrong. In the case of a willful trespass, an agreement of this character would be in contravention of public policy, and ought not to be enforced; but where there is nothing willful in the trespass, there is no reason why effect should not be given to the agreement. The rule is, that where the intention is to commit a trespass, the agreement will be void, but that where the object is to enforce a legal right, and the parties are actuated by no improper motive, the agreement will be valid "If," said the court of appeals of South Carolina, in *Jameison* vs. *Calhoun* (2 Speers, 19), "one man promise another to indemnify him for committing a crime, a misdemeanor, or a willful trespass, such promise is void; but this has never been supposed to extend to cases where the alleged trespass has been committed in prosecution of a legal right, unless the legal right be merely pretensive." See, also, *Crocker on Sheriffs*, 319.

Neither is the agreement invalid for want of a compliance with the statute of frauds. It was not a "special promise to answer for the debt, default or miscarriage of another," within the meaning of the statute. The plaintiff was not acting for himself, but as the agent of the defendant, and the promise was to be responsible for the consequences of his acts in that capacity.

The plaintiff was entitled to recover the costs incurred by him in defending the suit brought for the value of the property. His claim to indemnity extended to the entire damages to which he had been subjected on account of the seizure. 18 *Cal.* 624, 625.

SEC. 22. Any agreement respecting government contracts to be awarded to the lowest bidder, which tends to deprive the government of the advantage of competition in the bidding, is unlawful and void. 20 *Cal.* 182.

An agreement not to bid upon a contract which is to be awarded to the lowest bidder, and an agreement to withdraw a bid already made, are obnoxious to the same legal objections. 20 *Cal.* 182.

SEC. 23. S having put in a bid for carrying the mails over a certain route, agreed with C to withdraw his bid, and use his influence to induce the government to give to C a contract for a longer route, including the one bid upon, on consideration that if C obtained the contract, S should have an interest in it, or be paid an equivalent pecuniary compensation: *Held*, that the contract was void as against public policy. 20 *Cal.* 182.

SEC. 24. Any contract by a public officer, which interferes with the unbiased discharge of his duty to the public in the exercise of his office, is against public policy and void. 22 *Cal.* 336.

SEC. 25. A postmaster is a public officer, and in the discharge of his trust is bound to exercise his judgment for the public benefit in fixing the location of his office; and any contract by which this exercise of his judgment is sold for his private emolument, interferes with the discharge of his official duties, and is therefore void. 22 *Cal.* 336.

The question of the validity of a contract of a public officer, does not depend upon the circumstance whether it can be shown that the public has in fact suffered any detriment, but whether the contract is such in its nature as might have been injurious to the public interest. 22 *Cal.* 336.

The plaintiff, in expectation of receiving a commission as postmaster, entered into an agreement with defendants, whereby they leased to him certain premises for the term of one year, with the right on his part to extend the terms so

long as he should remain postmaster, not exceeding four years, in consideration of the sum of one dollar per year, and a covenant on his part, that as soon as he received his commission, he would remove the post-office to the leased premises, and continue the same there for all the time that he should hold the office: *Held*, that in an action for the breach of this contract by defendant, it contravened public policy and was void. 22 *Cal.* 336, 337.

If, in order to secure a fit location for an office, it should be necessary for a postmaster to agree to locate and continue it at a particular place, a contract to that effect might be valid, but to maintain an action thereon, such necessity would be required to be affirmatively shown. 22 *Cal.* 337.

SEC. 26. "Public policy" is a vague expression, and few cases can arise in which its application may not be disputed. Mr. Story, in his work on Contracts (Sec. 546), says: "It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void, as being against public policy." In illustration of this rule, he says (Sec. 576): "Where, therefore, a person occupying a public office agrees, for a reward, to exercise his official influence in questions affecting both public and private rights so as to bring about the private advantage of persons interested, the contract would be void. For every public officer is bound to be disinterested in the consideration of all public questions, and any contract which interferes with the free and unbiased exercise of his judgment in relation to a question of trust and confidence reposed in him, is against public policy and good morals." "Again (Sec. 577): Contracts for the sale of public offices come under the class of contracts in violation of public duty, and are void. And this rule obtains upon the ground that they tend to destroy the responsibilities of the office, and to betray the interests of the public." "So, also, the profits and emoluments of a public office of trust are not a good subject of sale. Thus, it has been held that the prize money of a sailor, or the full pay or half pay of an officer is not assignable at law, nor in

equity, upon the ground that any salary paid for the performance of a public duty ought not to be perverted to other uses than those for which it was intended." These citations are made, not as referring to cases of the same exact character as the one before us, but as illustrating the general principle—which is, that any contract by a public officer which interferes with the unbiased discharge of his duty to the public in the exercise of his office, is against public policy, and is void.

The case of *Fuller* vs. *Dame* (18 Pick. 472), is pertinent. In this case it appears that Fuller was a stockholder in the Boston and Worcester Railroad Corporation, and for a consideration he agreed to use his influence in procuring that corporation to locate its depot at a particular place in Boston, it being expressed in the agreement that Fuller was of opinion that the road ought, from a view to the public good and the good of the stockholders, to locate its depot at that place. The contract was held to be void on the ground that the road was established for the public accommodation, although a private corporation, and that the public had an interest in the question of the location of the depot, and though the contract was not made to induce a party to do an unlawful act, it put him under an influence to do that which might injuriously affect the interests of the public, and the court say: "Nor is it any satisfactory answer to say, that when the agreement was entered into he had come to the opinion that the location in question was the best for the interests of the public and for the interests of the corporation. That opinion might be changed by new views and new offers; and besides, the terms upon which this boon was to be obtained was still an open question. But upon all these questions the influence of the promise of separate and distinct advantage deprived him of the power of exercising a free, disinterested and unbiased, judgment." 22 *Cal.* 340–342.

SEC. 27. If any part of the consideration of an agreement be void as against public policy, the whole contract fails. This is well settled. See 1 *Parsons on Contracts*, 380.

It is equally well settled that courts of equity will never enforce any such contract. *Comyns on Contracts*, 53.

So, if A promise B money in consideration that he will not give evidence in a suit pending, such promise cannot be enforced, it being unlawful for any man to suppress evidence in any case. *Comyns on Contracts*, 63.

The ground upon which courts proceed in cases of this sort is well stated by Mr. Justice Baldwin in the case of *Bartle* vs. *Coleman* (4 Peters, 184).

The strong language of this case is but an elaboration of the principle asserted in the case of *Holman* vs. *Johnson*, (3 Cowp. 343).

Lord Mansfield there says: "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this, *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise, *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior est conditio defendentis*."

The authorities and the reason of the rule leave no question as to the right of a court and its duty to dismiss from its consideration a case based upon a consideration which contravenes public policy. Courts do not sit to give effect to such illegal contracts. The law is not to be subsidized to overthrow itself, though the parties to the litigation may not object to such a meretricious exercise of power. If the public time and the authority of the law were thus at the mercy of litigants, the sense of dignity and obligation to the laws from which the court derives its powers would con-

strain it to desist from the suicidal task of subverting the laws which it was organized to preserve and administer.

The cases of *Coleman* vs. *Sarrel* (1 Vesey, Jr., 51), and *Viser* vs. *Bertrand* (14 Ark. 276), are in point. The case of *Abbe* vs. *Marr*, etc., in this court, is to the same effect, as is the reasoning of the supreme court of the United States in the case before cited from 4 *Peters*, 184, where the pleadings failed to disclose the illegal consideration. 15 *Cal.* 404, 405.

SEC. 28. Fraud avoids a contract of sale. 12 *Cal.* 462.

Thus buying goods with a preconceived design of not paying for them, prevents the property passing. 12 *Cal.* 462.

The ownership of goods is not changed where the claim to such ownership is based on a fraudulent contract. 12 *Cal.* 457.

Where the defendant, intending to deceive the plaintiff, got from him a bill of sale for goods, under the representation that it was only to serve as a temporary security for the compliance by the plaintiff to furnish certain securities on previous indebtedness, and at this time intended to refuse to receive such security, or give plaintiff the advantage of such new contract; in other words, if the possession of the goods and the bill for them were procured by falsehood and deceit, such bill of sale was void, and such possession was unlawful. It would be really a procuring of the goods and bill of sale upon false pretenses. In such cases the party can take no benefit from his fraud. 12 *Cal.* 461.

It is as much a trespass to take possession under such circumstances, as without color of contract. The question is not, when the possession is fairly obtained, whether a fraudulent failure to comply with the contract—which is the consideration of such possession—avoids the sale, or makes the original taking tortious; but the point is, that an original fraudulent design, characterizing and entering into the contract at its inception—which fraudulent design is to use the form of a contract as a covering for a wrongful taking of another's property—is sufficient to divest such possession of every attribute of a sale, and to put the pretended vendee in the same condition as if he had taken the goods without the pretense of sale. On reason and authority, this proposition is law. 12 *Cal.* 461.

SEC. 29. Where a party knowingly misrepresents material facts, the law will not permit him to derive any benefit from the transaction. The injured party may elect to rescind the contract, or proceed upon the covenants of his deed. 7 *Cal.* 503.

SEC. 30. A voluntary promise by the holder of defendant's agreement, that he would not assign it, was not binding; and where the contract was in fact made for the benefit of a company in which the obligee held stock, with knowledge of that fact on the part of the defendant, such promise was in fraud of the company's rights, and the defendant could not avail himself of it. 8 *Cal.* 585.

Nor, if the fact is that defendant was kept in ignorance by the obligee of the contract that he was acting for the company, can the defendant avail himself of the fact as a defense, no fraud being alleged, while he retains the consideration paid for his contract. He cannot retain the consideration on the ground of fraud, and resist the payment of the penalty of an infraction of his contract, on the same ground. 8 *Cal.* 585.

SEC. 31. Mistake as well as fraud in any representation of fact material to the contract, furnishes a sufficient ground to set it aside and declare it a nullity. 7 *Cal.* 510.

A contract founded in mistake, both parties supposing they were contracting concerning a certain article, but which article had no existence, is void for want of the substance of the thing contracted for. 4 *Cal.* 21.

It is as much the duty of the vendor to know what he sells, as the vendee to know what he purchases. 4 *Cal.* 21.

SEC. 32. The designation of a contract by an improper term cannot be allowed to take away a substantial right, where all the circumstances under which it came into existence were fully and particularly detailed, and the information was sufficient to put the party upon full inquiry and to enable him to ascertain, by legal advice, the exact rights of all parties. 2 *Cal.* 492.

SEC. 33. Contracts made in this state on Sunday, are not void because made on Sunday. 26 *Cal.* 515.

SEC. 34. The law presumes in favor of the validity of

contracts (as to the capacity of parties to make them). 10 *Cal.* 400.

Under our free system of government, every man has the right to use his own property as he pleases, and to make what contracts he pleases in reference to it: *provided*, he does not injure others or violate some law. 7 *Cal.* 307, 308.

Courts do not make contracts for men. They are supposed to be able to make contracts for themselves; and if a man chooses to bind himself to pay money on a particular event, he may as well also, give character to that event and mark and describe it, and hold himself only bound by or after the event so defined. 12 *Cal.* 329.

SEC. 35. It is not alone the influence of liquor which avoids a contract, but it must be shown to exist to such extent as to seriously impair the reasoning faculties at the time of the contract. 5 *Cal.* 412.

SEC. 36. The defendant can avoid a promise to pay money when such promise was made during infancy, though he did not disaffirm the contract after arriving at maturity. 2 *Cal.* 102.

SEC. 37. The effect of a marriage, at common law, was to deprive the wife of all separate, legal existence, her husband and herself being deemed at law but one person. One result of this principle was, that at law, she was incapable of binding herself by a contract. But the hardship of the rule was found so great that exceptions were made to it even at law. Thus, if the husband became *civiliter mortuus*, or even transported for a term of years, or had been abroad and unheard of for seven years, or even had left the state without the intention of returning, it was held that she could contract in her own name, and was liable to be sued alone thereon. 23 *Cal.* 563.

Execution of Contracts.

SEC. 38. It is a general principle that the signer of any contract, if he intends to prevent a resort to himself personally, should express in the contract the quality in which he acts. 7 *Cal.* 540.

The *capacity* in which the party acted in signing his name to an instrument must appear alone upon the face of

the instrument itself; and if not so apparent, he must be presumed to have acted in his own individual capacity, and be held responsible accordingly. 7 *Cal.* 540.

SEC. 39. The word "agent," appended to the signature of the agent, is not mere *descriptio personae*, but is a designation of the capacity in which he acted, (but see a former decision). 7 *Cal.* 535.

When one makes a written contract, intending to act therein as the agent of another and to bind his principal, it is necessary that it should appear in the contract itself that he acts as such agent. 7 *Cal.* 539.

SEC. 40. A contract entered into by a number of individuals, describing themselves in the contract as "directors of the Placer Hotel Company," and signed by them individually, is their individual contract, and not that of the company. 4 *Cal.* 330.

SEC. 41. If a conveyance, purporting to be the conveyance of a corporation, made by one authorized to make it for them, be in fact executed by the attorney as his own deed, it is not the deed of the corporation, although it was intended to be so, and the attorney had full authority to make it so. And if the deed be written throughout as the deed of the corporation, and the attorney when executing it declares that he executes it on behalf of the corporation, but says: "In witness whereof, I set my hand and seal," this is his deed only, and does not pass the land of the corporation. If, however, it was only a simple contract which was executed in this way, it might be inferred from the general principles of the law of agency that it would be valid as the contract of the corporation, for it would be a contract made by one as the agent of another and containing the express declaration that it was so made. 13 *Cal.* 49.

SEC. 42. A party may bind himself, if such is his design, by a fictitious signature, and if he admits such to be his intention, he cannot complain that he is held by it. 10 *Cal.* 444.

Modification of Contract.

SEC. 43. In a suit brought on *quantum meruit*, for work and labor, testimony is admissible to prove that the original

contract has been changed at the request of the defendants and the value of the extra work performed. 4 *Cal.* 274.

SEC. 44. Where the entire performance of a special contract has been prevented by one of the parties, or its terms have been varied by subsequent agreement, the action for the amount due for work and labor should be in the form of *indebitatus assumpsit*, and not upon the contract. 6 *Cal.* 108.

In such case, the contract may be introduced in evidence by either party as an admission of the standard of value or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion. 6 *Cal.* 108.

SEC. 45. *Facts Excusing Compliance with Contract.*—If a draft is given for part of the purchase price of goods, under a contract that the vendor shall keep the goods ninety days, and then deliver them upon the payment of the entire price, less the draft, and before the time expires the purchaser notifies the vendor that he cannot comply with the contract but will pay the draft, the vendor is excused from keeping the goods. 31 *Cal.* 383.

Entirety of Contract.

SEC. 46. An entire contract is indivisible—the whole must stand or fall together. But a contract, made at the same time, of different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale had such failure been anticipated. 15 *Cal.* 256.

Thus, a sale of nine slaves for a gross sum is an entire contract. There being no means afforded for determining the price of each one, the agreement is implied that the whole are to be taken or none. 15 *Cal.* 227.

SEC. 47. Where the contract is entire, a breach of part is a breach of the whole, and discharges the party complaining of it from the performance of any of the conditions

on his part, and gives him a complete right of action. 4 *Cal.* 411.

SEC. 48. If the contract for the erection and completion of a building is entire, and the contractor abandons the work before it is completed, he loses the right which he would have had to the full compensation agreed on. 31 *Cal.* 233.

See WORK and LABOR.

Interpretation and Construction of Contracts.

SEC. 49. Contracts like statutes, under which a forfeiture is claimed to have accrued, should be construed strictly; and the facts urged in support of the forfeiture ought to be clear and explicit, and not be left to inference and argument. 1 *Cal.* 200.

Definition of Words used in a Contract.—Contracting parties have the power to define the words which they use in the contract, and if the agreed definitions are free from ambiguity, the contract will be enforced according to the definition thus assigned. 30 *Cal.* 344.

A written contract must be construed so as to give effect, if possible, to all its parts. 1 *Cal.* 200.

SEC. 50. Where any doubt exists as to the true meaning of a written contract, the conditions and motives of the contracting parties, as shown by its recitals or by outside evidence, must be looked into to ascertain what was the real intention of the parties, which, when ascertained, must prevail over the literal sense. 29 *Cal.* 299.

SEC. 51. *Contracts with Two Constructions.*—Where a contract admits of two constructions, one of which nullifies the contract and the other upholds it, the former must be discarded and the latter adopted. 29 *Cal.* 299.

SEC. 52. The doctrine of election applies only to cases where the party upon whom rests the performance stands in the same position to both alternatives presented, and is bound to indicate his choice between them. In cases where the doctrine is applicable, the right of election upon failure of the party upon whom the performance rests to indicate his choice passes to the other side, as in this way only can the obligation become absolute and determinate. Thus, if

a debtor, by a given day, is to pay money or furnish goods, it is evident that upon a failure to indicate which of the two he will do, the obligation would be indefinite and uncertain. But this is quite different from a contract to do a certain thing absolutely by a given day, with the privilege of discharging the obligation in some other way previously. In such case, if the privilege is not exercised, the obligation is not left in uncertainty, but is definite and absolute. 15 *Cal.* 258.

SEC. 53. A parol variation of an agreement under seal, after its execution, will be upheld, because one will not be permitted to take advantage of the non-performance of that which he prevented. 4 *Cal.* 336; 2 *Cal.* 584.

SEC. 54. In the construction of contracts, the primary object is to attain the meaning of the parties; and this meaning is to be gathered from the language which they have employed, the subject to which it applies, the nature of the transaction and surrounding circumstances. 16 *Cal.* 448.

SEC. 55. Courts will always give a reasonable interpretation to contracts when the words justify it. 10 *Cal.* 540.

In a court of law, effect is to be given to a bargain according to its terms, and courts of law cannot speculate upon the weight attached to one or another of the elements of an obligation. 12 *Cal.* 240.

Where several papers, concerning the same subject matter, are executed by or between the same parties at the same time, all are to be construed together as one instrument. 12 *Cal.* 577.

SEC. 56. When it is necessary to give an opinion upon the doubtful words of the deed, the first thing to be inquired into is, what was the intention of the parties? If the intention of the parties be as doubtful as the words, it will be of no assistance at all, but if the intent of the parties be plain and clear, such construction ought, if possible, to be put on the doubtful words of a deed as will best answer the intent of the parties, and reject that construction which manifestly tends to overturn and destroy it. 10 *Cal.* 105, 106.

To arrive at this intention, the situation of the parties, and the subject matter at the time of contracting, should be considered; the whole deed should be taken together, and,

if possible, effect should be given to all of its parts. It is a true and important rule of construction, that the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus;* that is to say, every part of it should be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done; or, in other words, the construction must be made upon the entire instrument, and not merely upon disjointed parts of it; the whole context must be considered in endeavoring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause. In short, the law will adjudge of a deed or other instrument consisting of divers parts or clauses, by looking at the whole, and will give to each part its proper office, so as to ascertain and carry out the intention of the parties. 10 *Cal.* 106.

The reason of this rule is, that the same parties make all the contract, and may be supposed to have the same purpose and object in view in all of it; and if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others. If several instruments are made at the same time, by the same parties, and in relation to the same subject, the intention of the parties is to be gathered from all the instruments taken together, and the recitals in each may be explained or corrected by reference to any other. 10 *Cal.* 106.

Oral evidence is sometimes admissible to explain but not to contradict or vary the terms of a written contract; thus, if the words of a contract be ambiguous, its meaning may be gathered from contemporaneous facts which intrinsic testimony establishes. If, when the intention is thus ascertained, it is found that the words will fairly bear a construction which makes them express this intention, then the words will be so construed, and the contract in this sense, or with this interpretation, will be enforced as the contract which the parties had made. The distinction between patent and latent ambiguities are now regarded as intended to enable the court to distinguish between cases curable and those of incurable uncertainty; to carry the aid of evi-

dence as far as it can go, without making for the parties what they did not make for themselves. 10 *Cal.* 106.

Sealed Contracts.

SEC. 57. The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the consideration of a sealed bond may be impeached by the obligor in the same manner as a promissory note by the maker. The intention of the legislature was to place bonds and notes on the same footing in respect to defense. 12 *Cal.* 286.

SEC. 58. When no words appear in the body of the instrument of the intent to make it a sealed instrument, it will not be such, even though the characters (L.S.) are added. 13 *Cal.* 220.

SEC. 59. *Sufficiency of.*—An impression upon paper constitutes a good seal, and this may be made as well by a pen as by a stamp; therefore, a scrawl, with the word "seal" written within it, or with the initials L.S., is sufficient. 5 *Cal.* 315.

SEC. 60. *Seal of Corporation.*—Admitted, for the purpose of this decision, that a corporation may adopt the private seal of the several trustees or any one of them as its seal for the occasion. 33 *Cal.* 11.

Contracts with the State.

SEC. 61. The state can claim no greater exemption than an individual from the usual consequences of an unwise and impolitic contract. 15 *Cal.* 457.

Contracts with Executors or Administrators.

SEC. 62. An executor or administrator is, in ordinary cases, personally liable upon contracts made by him, in his representative capacity, after the death of the person whom he represents, and supported by some new consideration. 1 *Cal.* 392.

The public administrator is the representative, not of the government nor of any political subdivision of the state, but of a private estate committed to his charge; for his services in relation to which he is entitled to receive a percentage as compensation. 1 *Cal.* 392.

SEC. 63. No distinction can be made between contracts made by a public administrator with third persons and contracts made by common executors and administrators. The mode of appointment is different—the responsibility the same. 1 *Cal.* 392.

Contracts of Corporation.

SEC. 64. Contracts of corporations, whether public or private, stand on the same footing with the contracts of natural persons, and depend on the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner and to the same extent as the latter.

As a rule, the powers of corporations, municipal or others, must be exercised in the mode pointed out by the charter. But even a want of authority is not, in all cases, a sufficient test of the exemption of the corporation from liability in matters of contract. An executory contract, made without authority, cannot be enforced; but where the contract has been executed and the corporation has received the benefit of it, the law interposes an estoppel and will not permit the validity of the contract to be questioned. 16 *Cal.* 273.

As to the contracts of corporations, the rule is, that when the question is one of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the contract cannot, in an action founded upon it, contest its validity. And this rule applies with equal force to all corporations, public or private. 16 *Cal.* 264.

SEC. 65. A municipal corporation derives all its power from its charter; and where its charter prescribes the mode in which its contracts shall be made, no contract will bind the corporation unless made in that mode. 20 *Cal.* 96.

SEC. 66. A municipal corporation acting under a charter expressing the mode in which its contracts for the improvement of its property shall be made, cannot be rendered liable for improvements made in the absence of such contract, on the ground of an implied contract to pay for the benefits received. The law never implies an agreement

against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to. 20 *Cal.* 97.

As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money or other property which does not belong to her and to liabilities springing from neglect or duties imposed by her charter from which parties are enjoined. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as, for instance, upon the issuance of bills of credit. 16 *Cal.* 283.

SEC. 67. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city and, when completed, were approved of and received by him, on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: *Held*, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. 16 *Cal.* 274.

The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to grade, plank and sewer, a portion of Mission street, in said city, "the same to be paid for by the property holders adjacent * * the proposal to be opened

and awarded by the street commissioner, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committees of the two boards and the commissioner, and the work awarded to B. Subsequently, an instrument was executed by B as contractor and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B's proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner and to the satisfaction of the street commissioner and the city. The work was measured as it progressed, by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer and payment demanded, and refused on the ground that there were no funds in the treasury applicable to them. Previous to the demand, assessments had been duly levied by the city upon the property adjacent to the improvements to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants or upon implied contracts, for the services rendered and materials furnished, or for the money received by defendant to his use: *Held*, that as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B by the street commissioner and the committees of the two boards, converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor: *Held*, further, that the city is primarily liable; that she, and not

the contractor, must look to the property holders adjacent to the improvements for the necessary expenses; that the property holders are not parties to the contract; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance, as to how the improvements shall be paid for, is only a designation of the sources upon which the city relies for payment. 17 *Cal.* 276.

SEC. 68. The terms, "adopted" and "ratified," are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. 12 *Cal.* 551.

Ratification is equivalent to a previous authority. It operates upon the contract in the same manner as though the authority to make the contract had existed originally. 20 *Cal.* 96.

The power to ratify necessarily supposes the power to make the contract in the first instance; and the power to ratify in a given mode, supposes the power to contract in the same way. 20 *Cal.* 96.

Thus, where the charter of a municipal corporation authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. The corporate authorities cannot do retroactively what they are prohibited from doing originally. 20 *Cal.* 96.

SEC. 69. A contract not in its origin obligatory upon a municipal corporation, by reason of not having been made in the mode prescribed by the charter, cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities and a liability be thereby fastened upon the corporation. 20 *Cal.* 96.

SEC. 70. A ratification of a contract made by an agent professing to act therein for the principal, but not having authority for such purpose, must, in order to bind the

principal, be made by him with a knowledge of the terms of the contract and the material facts affecting it. 20 *Cal.* 602.

A ratification amounts, in itself, to presumptive evidence of everything necessary to sustain it. It supposes a knowledge of the thing ratified, and in the case of a contract the inference from the ratification is that its terms were known; and to rebut this inference, evidence of mistake or misapprehension is required. 20 *Cal.* 602.

N, the president, and also one of the trustees, of a corporation, made on its behalf a written contract for the purchase of certain ditch property, and immediately thereafter participated in a meeting of the trustees, at which he made a written report stating that he had purchased the property, and stating partially, but not fully, the terms of the contract, upon which the trustees by a vote ratified the report and proceedings: *Held*, that the board must be presumed to have known the terms of the contract which it ratified; that this presumption could only be overcome by evidence to the contrary; that the facts presented did not show a want of knowledge, but that from the presence and participation of N, actual knowledge by the board was rather to be inferred. 20 *Cal.* 602.

Rescission of Contracts.

SEC. 71. The rule is general that the right to rescind a contract rests only with the party who is without default. One party cannot violate the contract himself and then seek a rescission, on the ground that the other party has followed his example. *Chitty on Cont.* 636.

Where the contract has been in part performed, and the parties cannot be restored to their original position, the right of rescission cannot exist. A contract cannot be rescinded "if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed. Generally, no contract can be rescinded by one of the parties, unless both can be restored to the condition in which they were before the contract was made. If, therefore, one of the parties has derived

any advantage from a partial performance, he cannot hold this and consider the contract as rescinded because of the non-performance of the residue, but must do all that the contract obliges him to do, and seek his remedy in damages." 15 *Cal.* 458.

It is a universal rule, that where a party seeks to recover back money paid upon a contract, on the ground that it is void for fraud, or that it has been rescinded, such party must restore, or offer to restore, whatever he has received under the contract, so as to put the other contracting party in *statu quo*. Whatever may be valuable to the defendant must be restored to him, though it be of no value to the plaintiff. 16 *Cal.* 638; 15 *Cal.* 458.

The rule is, that a party entering by virtue of a contract, and holding possession under, and enjoying the fruits of a contract, if he desires to rescind it for fraud, must act promptly and give notice promptly of his intention to rescind it; otherwise he will be held to have waived the fraud. He cannot lie by and enjoy the benefits of a contract until the other party seeks to enforce it, and then set up its invalidity, when he knows that the representations which induced him to make it were fraudulent 3 *Johns. Ch. R.* 23; 17 *Johns.* 437; 1 *S. & M. Ch. R.* 390; 9 *Porter*, 420. 17 *Cal.* 384.

In order to rescind a contract for the sale of land, on the ground that the vendor cannot perform it, because he has no title to the land, it is necessary for the vendee to aver and show an outstanding paramount title in another. 4 *Cal.* 267.

SEC. 72. A parol agreement to rescind a contract under seal, is good if such parol agreement is executed. Such an agreement may be presumed from the acts of the parties. 2 *Cal.* 585.

SEC. 73. The cases where possession must be surrendered before action can be brought for the purchase money, are those where a contract has been made and possession has been taken thereunder, and the vendee seeks to rescind the contract on the ground of defective title, or the inability of the vendor to perform the contract on his part, or of some fraudulent representations inducing its execution. In these

cases the vendee must first offer to restore whatever he has received, before he can call upon the vendor to refund the purchase money. *McCracken* vs. *City of San Francisco*, 16 Cal. 628.

Where the contract is void, there is nothing to rescind, no rights are acquired, and there are in consequence no rights to restore. This distinction between the cases where the possession is taken *under* a contract, and where there is possession with a void contract—that is, where there is no contract—rests upon principle, and is fully recognized by the authorities. 16 *Cal.* 628.

There can be no rescission of a contract against public policy. Such contract is void at its inception, and there is nothing to rescind. 37 *Cal.* 168.

Performance of Contracts.

SEC. 74. Where the defendant being the owner, in whole or in part, of certain steamers, in consideration of a sum of money paid to him, covenanted that he would not run, or suffer to be run or employed, those steamers on certain waters of the state: *Held*, that he was not released from his covenant by a sale of the steamers or of his interest therein. 8 *Cal.* 585.

SEC. 75. Every one must be held bound by the plain and obvious meaning of his engagements. The plaintiff, to maintain his action, must show that he has done all that he agreed to do. Thus, in an action on a written contract to deliver a certain quantity of "sound" rice, the plaintiff must show that the rice was "sound," and failing to do so, he cannot recover on the contract. 4 *Cal.* 357.

SEC. 76. It is a general principle of the common law that whoever seeks redress for the violation of a contract resting upon mutual and dependent covenants, to obtain redress, must himself have performed the obligations on his part. 10 *Cal.* 254.

SEC. 77. Where promises are dependent, neither party can maintain an action against the other without showing performance or an offer to perform. 1 *Cal.* 338.

As, when A agreed to carry to B a certain vessel, called the "Mariposa," and B gave his promissory note for the

consideration money, payable at a future day : *Held*, that A being still the holder of the note, could not bring an action thereon without showing that he had conveyed the vessel to B or had tendered a conveyance. 1 *Cal.* 338.

SEC. 78. Where the contract is entire, a breach of part is a breach of the whole, and discharges the party complaining of it from the performance of any of the conditions on his part, and gives him a complete right of action. 4 *Cal.* 411.

SEC. 79. Where the contract declared on is joint, and there is no evidence showing that one of the parties sued was party to the contract, he cannot be made liable on the contract. His receipt of money on account of work is not sufficient to fix his liability. It would be at most, a mere circumstance, which should be left to the jury, tending to show that he may have been a party to the contract, if there was any controversy on that point. 4 *Cal.* 232, 233.

SEC. 80. While it is a general rule that a contract is obligatory between the parties who execute it, yet it may, in certain cases, be enforced by a party for whose benefit it was made. If, for example : A stipulate with B to pay to C a stated sum of money, C can enforce the contract. 7 *Cal.* 473, 474.

SEC. 81. The plaintiff sued the defendant to recover a sum of money agreed by express contract to be paid him by the supervisors, as examining physician of the hospital for the county for one year, from October 17th, 1856, to October 17th, 1857. The complaint avers that he entered upon the duties of the office or appointment, and was ready to perform at all times the duties imposed by the contract as they should be required. The contract having been made by the board of supervisors, it was not in their power to abrogate it by rescinding the order under which the plaintiff was appointed or abolishing the office. This has been often decided. The distinction is very apparent between an office constituted by legislative act, and a contract made with a party to render for a stated period certain services, though these services are to be rendered in a capacity in the nature of a public office or appointment. 14 *Cal.* 445, 446.

SEC. 82. A man pledging the fruits of his labor to pay

his debts, may not be compelled by his creditor to work, but if he does work and earns the money, we suppose it could scarcely be held that he may dispose of the money as he chooses. 16 *Cal.* 34.

SEC. 83. "A promise and a tort," says Hilliard, "may be coincident, giving to the party injured by the breach of the promise, a remedy, as for a simple wrong, without reference to the accompanying contract as such. In other words, the breach of a contract may be a wrong, in respect of which the party injured may sue in tort, instead of suing upon the contract." *Hill on Torts*, 3.

The cases in which this principle has been applied are very numerous. In *Ives* vs. *Carter* (24 Conn. 392), the plaintiff had been induced, by fraudulent representations, to enter into a contract, which was subsequently broken. The question was, whether the plaintiff could sue in tort for the fraud or was compelled to seek relief by an action upon the contract. The court said: "In a case thus situated, it appears to us, that the party may have his election to sue either upon the contract or for the fraud; and, in either case, so long as it appears that the party is entitled to the remedy he has selected, it can be no objection that he was also entitled to another remedy." In *Cary* vs. *Hotailing* (1 Hill. 311), it was held, that a fraudulent vendee of goods might be charged in assumpsit for the price, or in trespass, at the pleasure of the vendor. In *Donnell* vs. *Jones* (13 Ala. 490), an action in tort was maintained for the wrongful and malicious suing out of an attachment, although the plaintiff might have proceeded upon the attachment bond. 18 *Cal.* 533.

SEC. 84. In an action on a bond, conditioned that the defendant should, by a certain day, procure and deliver to the plaintiff a certain bond and mortgage, and discharge the same of record, and the defendant did produce them and offered them to the plaintiff, proposing to do whatever else he required to discharge the mortgage, but the plaintiff, not knowing what was necessary to be done, agreed, by parol, to waive a literal performance, in this respect, if the defendant would do another act, which he afterwards did,

it was held, that the evidence of a parol waiver was admissible, and amounted to a defense. 4 *Cal.* 316.

He who has had the benefit of an act or who prevents a thing from being done, cannot be allowed to take advantage of the non-performance which he has occasioned. 4 *Cal.* 316.

The subsequent parol contract is not void, under the statute of frauds. The statute contains no provision with regard to the dissolution of agreements or contracts under seal for the sale of land. Although the subsequent parol contract might nave been void, its execution took it out of the statute, and it is binding on the parties. 4 *Cal.* 317.

SEC. 85. In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guaranteed to the vendee, that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties; on breach of such contract, where no special damage is alleged, the measure of damage is the highest market price of the fruit on the trees at the orchard, if there is any market value for it there; if not, then if the vendee is prepared to gather it and carry it to the market, the market value there, less the cost of gathering and carriage. 12 *Cal.* 171.

If other persons were in possession of the orchard when the vendee went to gather the fruit, and if those persons forbade him or his agents and servants from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal collision or violence, then the guarantee was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold the defendant responsible on the guarantee, as he was not bound to take a portion of his contract. 12 *Cal.* 171, 172.

A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. 12 *Cal.* 172.

SEC. 86. Suit was brought on an agreement for the sale of certain cattle. This agreement was evidenced by a memorandum in this form: "Jan. 24th, 1860. Sold to Michael Maher, forty head of heifers, two years old in spring,

to be delivered to him as soon as we can collect them up off the plains—three weeks at the furthest—American heifers. The title we guarantee. C. & J. Riley." The sum of about one thousand dollars was the consideration of this contract, it being the price agreed on and paid for the cattle. The complaint avers the breach of this agreement to deliver the cattle. The common counts are also added. The court instructed the jury, if the defendants did not have the cattle ready for delivery at the time mentioned in the agreement, they should find for the plaintiff, and in assessing the damages, they might find the amount of the purchase money and ten per cent. interest, or they might find the highest market price of the cattle to the time of trial. We think there was no error in this instruction. It affirms the doctrine in *Davovich* vs. *Emeric*, (12 Cal. 171), and (*Sedg. on Dam.* 264). 17 *Cal.* 415, 416.

SEC. 87. The law is well settled, that where a contract for service is made for a fixed period, if the employer discharge the servant before its termination, without good cause, he is still liable, and the servant may recover the stipulated wages. Thus, where the steamer owned by the defendant, upon which the plaintiff was employed as steward, was laid up by the defendant in pursuance of a contract made by him to that effect with other parties; but the defendant did not notify the plaintiff that he should no longer employ him, and the plaintiff continued at all times ready to perform the service required by the contract between him and the defendant; the mere laying up of the steamer did not of course terminate the relation of the defendant as employer, or release him from his obligations to the steward. And even had he discharged the steward, his liability would have continued, there having been no cause arising from the latter's conduct for the proceeding. 19 *Cal.* 292.

SEC. 88. In an action to recover the value of services, and work and labor performed under a contract, the plaintiff has the right to prove the value of the services of an assistant employed by him, and who performed the same work plaintiff contracted to do, unless it appear by the nature or terms of the employment that the services of a particular person was contracted for, and that no other person could,

under the contract, fill the place of the employé. 24 *Cal.* 399.

CHAPTER V.

CONTRACT OF ACCOUNT.

SECTION 1. An account, in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause that errors are excepted. 9 *Cal.* 360.

SEC. 2. The right to sue a county is not limited to cases of tort, malfeasance, etc., but is given in every case of account, after presentation to, and rejection by, the board of supervisors. 6 *Cal.* 256.

An action of *assumpsit* is the proper remedy on an account against a county which has been rejected by the board of supervisors. 6 *Cal.* 255.

SEC. 3. Where in a suit on an account stated, the only evidence was that of a witness who said defendant, on presentation of the account, admitted it to be correct and promised to pay it, and the court charged the jury, that if they believed the testimony of the witness, they must find for the plaintiff the amount claimed, and they so found: *Held*, that the instruction did not prejudice defendant, as but one verdict could have been rendered under the evidence. *Terry* vs. *Sickles*, 13 Cal. 427.

SEC. 4. To sustain an action on an account stated, it must be shown there was a demand in favor of plaintiff acceded to by defendant; and if defendant does not object to the account as presented, within a reasonable time, his silence will be an admission of its correctness. *Terry* vs. *Sickles*, 13 Cal. 427.

SEC. 5. In such action, evidence that the items of the account are overcharged is not admissible, the complaint being verified and the answer not averring fraud or mistake in the accounting. *Terry* vs. *Sickles*, 13 Cal. 427.

SEC. 6. *Account with Memorandum.*—An account stated, with a memorandum "payable in gold coin (United States) according to contract" and signed by the defendant, is ad-

missible as written evidence of a contract on the part of the defendant to pay in gold coin. 33 *Cal.* 694.

SEC. 7. Where accounts bear upon their face the words "audited and approved" and "certified to be correct": *Held*, that this is language sufficient to create them instruments of writing within the meaning of the statute. 5 *Cal.* 57.

SEQ. 8. Where an account has been stated by the plaintiff, charging interest both on the debt and the payment and rendered to the defendant, and no objections made thereto within a reasonable time, it is the same as an agreement that the interest should be computed accordingly. 3 *Cal.* 231.

SEC. 9. And when the party who seeks to go behind the stated account, goes into particulars and specifies the articles improperly charged or omitted, he is confined to those items, and the remainder of the account must stand. 3 *Cal.* 231.

SEC. 10. An account stated alters the name of the original indebtedness and constitutes a new promise or undertaking. 33 *Cal.* 694.

SEC. 11. Mutual accounts are made up of matters of set-off, where there is an existing debt on the one side which constitutes a credit on the other, or where there is an express or implied understanding that mutual debts shall be satisfied or set off, *pro tanto*, between the parties. 30 *Cal.* 127.

SEC. 12. A payment, whether it be made in money or of an article of personal property of a stipulated value, made on an account and intended as a payment, and not as a set-off, *pro tanto*, does not make an account mutual. 30 *Cal.* 127.

SEC. 13. Where money is delivered by one party to the other, and credited on account by him who received it, it will be treated as intended as a payment, unless it is shown to have been delivered as a loan, but not so with personal property, even though a value be affixed thereto. 30 *Cal.* 127.

SEC. 14. *When Property Received and Credited makes Account Mutual.*—The defendants, being indebted to the plaintiffs on account, delivered them an article of personal property, for which the latter gave the former credit at a specified valuation: *Held*, that thereby the account consisted of reciprocal demands between them. 30 *Cal.* 126.

SEC. 15. *Striking of a Balance on Accounts, where there are*

Demands on each Side.—The striking of a balance converts the set-off into a payment, and from that time the statute of limitations commences running. 30 *Cal.* 126.

SEC. 16. Until a balance is struck a mutual account is open and current. 30 *Cal.* 126.

SEC. 17. Where one party is selling the other goods from time to time, and charging the same, and the other gives him money which he credits on the account as a payment, this credit does not make the account a mutual one within the meaning of the eighteenth section of the statute of limitations. 35 *Cal.* 122.

CHAPTER VI.

CONTRACT OF AGENTS.

	SECS.		SECS.
OF THE DIFFERENT KINDS OF AGENTS	1–13	THE EXTENT OF AUTHORITY AND LIABILITY OF PRINCIPAL	34–43
OF THEIR APPOINTMENT AND THE REVOCATION OF THEIR POWER	14–33	OF FACTORS	44–51
		WHEN THE AGENT IS PERSONALLY LIABLE ON HIS CONTRACT	52–59

Different Kinds of Agents.

SECTION 1. An agent may make contracts which will be equally binding on his principal as if made by the principal himself, but it is necessary that the principal has ability himself to do all acts which he confers upon another to do. An *agent* is therefore defined to be one employed by any person, competent to do any act for himself, to do it for him. 1 *Story's Agency*, Sec. 6.

SEC. 2. The employer is called the *principal* and the employment an *agency*. Any person who is not actually disabled by weakness of mind or want of understanding, may be an agent. What would constitute a legal disability to contract for himself, will not incapacitate him from becoming an agent—thus, infants, slaves or married women, may act as agents. 1 *Story's Agency*, Sec. 7.

SEC. 3. To constitute a valid agency, where property is its subject, it is not essential that the principal should hold

the legal or equitable title or more than a naked claim of title; it may be created for the acquisition of title, either legal or equitable, or for the protection of an asserted title. *Hardenbergh* vs. *Bacon*, 33 Cal. 356.

SEC. 4. The authority of an agent may be conferred verbally, and it may be implied from the acts of the parties. An implied agency, is where one suffers another to do acts in his name, to buy goods or sell them, to sign his name to notes or checks; he is presumed to have given him an authority to do so, and his acts will bind him. Where, however, some act is required to be executed by a *sealed instrument*, the authority must be given, in writing, under seal. *Story on Agency*, 49.

SEC. 5. When the authority to the agent is in writing, the written instructions must be strictly followed.

SEC. 6. A *special agency*, is an agency to do a special or single act, as to sell my horse, with or without warranty, or to purchase a horse for me. If a special agent exceed his authority, the principal is not bound by his acts, unless the principal has held him out as his authorized agent for other purposes. The question for the justice in such cases is, what were the acts of the agent and principal in other transactions of a similar kind, or whether their business relations were such as to justify a man of reasonable prudence to infer the power of the agent to act. One who deals with a special agent is bound to acquaint himself with the extent of his authority. *Story on Agency*, Sec. 126.

SEC. 7. A *general agent*, is one who has a general authority. His power is not confined to particular acts, but extends to all acts which the principal himself, if present, might do; and the principal is bound by all his acts within the scope of his authority. *Story on Agency*, Sec. 126.

SEC. 8. The principal is bound by all the representations of his agent, in any trade or transaction, which his agent may make. As, when the agent in selling a horse, represents him as sound or a safe horse in harness; if the horse prove otherwise, the principal is responsible for the damages. Therefore, the representations, admissions and concealments, of an agent *made at the time*, and constituting a part of the transaction, and being an inducement to the con-

tract, are binding upon the principal, though if made at another time, and without forming a part of the transaction, are not binding. 6 *Hill's Reports*, 336.

SEC. 9. An agent cannot delegate his authority to another, for it is a maxim of law, that delegated power cannot be transferred by the delegate. He must transact the business intrusted to him in the name of his principal, or the contract will not bind the principal, but will become binding upon himself. *Cowen's Treatise*, Sec. 160.

SEC. 10. An agent, whether he be a mercantile agent, or a mere domestic servant, may, in general, be appointed by mere words (see *Stackpole* vs. *Arnold*, 11 Mass. 27), and writing is not necessary to empower him to act, even for the purposes described in the twelfth and thirteenth sections of the statute of frauds (see *Hittell*, Secs. 3156, 3157), viz: to charge a person to answer for the debt of another, or upon an agreement in consideration of marriage, or upon a contract or sale of premises or an interest therein, or upon a contract not to be performed within one year; it being held, that although these contracts are to be in writing and signed, yet an agent may sign them without having a written authority. *Coles* vs. *Trecotlick*, 9 Ves. 234, 250. Nor is a written appointment necessary to authorize an agent to sign an agreement for the purchase of goods, under the thirteenth section of the act. *Webb* vs. *Browning*, 14 Mo. 354; *Story on Agency*, 51, 52; *Dunlop's Paley's Agency*, 159, 160.

SEC. 11. An agent for the sale of goods sometimes acts under a *del credere* commission; that is, for a higher reward than is usually given, he becomes responsible to his principal for the solvency of the vendee; or, in other words, he guarantees, in every case of sale, the due payment of the price of the goods sold. See *Morris* vs. *Cleasby*, 4, M. & S. 574.

SEC. 12. The undertaking of the *del credere* agent, is an original, absolute and independent, engagement, entirely between the principal and the agent, before the sale and separate from it, and of course before any debt has accrued from the purchaser. It does not affect the ordinary relations between the principal or the agent and the purchaser. See *Swan* vs. *Nesmith*, 7 Pick. 220; *Leverick* vs. *Meigs*, 1 Cowen, 645.

SEC. 13. The *del credere* has no different power over the property of his principal or the avails of it than an ordinary agent. He has his lien for the additional charges growing out of his extraordinary responsibility, but it differs only in degree from that of other agents. *Thompson* vs. *Perkins*, 3 Mason, 232, 242.

Appointment of Agent and Revocation of his Power.

SEC. 14. Although it would appear to be now settled that the liability of a *del credere* agent is merely collateral to that of the vendee (5 *Hill.*, N. Y., 458, *ante* 195, Note), it is necessary that his engagement should be in writing (*Coutourier* vs. *Hastie*, 8 Exch. 40). 5 *Hill.* (*N. Y.*) 458.

SEC. 15. But a deed cannot be executed by an agent, so as to bind his principal, unless the authority to execute it be conferred by deed (*Appleton* vs. *Binks*, 5 East. 148), or is executed at the request of the principal, in his presence, in which case it would be a valid execution. Thus, a deed signed in the presence and at the request of P, and in the presence of an attesting witness, in these terms: "P by M;" the whole deed, including the signature, being written by M, is properly executed as the deed of P. *Gardiner* vs. *Gardiner*, 5 Cush. 483. To hold that this might not be a good execution, Mr. Chief Justice Shaw remarked, in this case, "would be to decide, that a person having a clear mind and full capacity, but, through physical inability, incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed, would prevent him executing a letter of attorney, under seal. See *Wood* vs. *Goodridge*, 6 Cush. 121, 126. So, for the purpose of *creating* a freehold or leasehold interest, or any uncertain interest (other than leases for a longer term than one year), in tenements, or of surrendering the same (except copyhold interests), the authority of the agent must be in writing. *Hittell*, Sec. 3150. The authority to *contract* for a lease or interest in land need not be in writing, though the authority to sign the lease or instrument by which the *interest passes*, must be so. 5 *Hill (N. Y.)*, 107. And so, where the authority of the agent is conferred by a corporation, it must, in general, be by writing, under

their common seal (*Rex* vs. *Biggs*, 3 P. Coms. 425), although there may be cases in which, for the benefit of trading corporations, this rule would be, in some measure, relaxed. *Russell on Factors*, 11–13; *Yerby* vs. *Grigsby*, 9 Leigh, 387.

SEC. 16. There are cases, moreover, in which an authority may be implied, and *no* authority was ever given, in fact. Thus, if the owner of a horse send it to a *common repository* for the sale of horses, or if the proprietor of goods send them to an auction room or to a broker whose ordinary business it is to sell goods of that description, the owner will be bound by a sale to a *bona fide* purchaser, although made without his express consent, because an authority to sell shall be presumed against him. See *Pickering* vs. *Busk*, 15 East, 38, 45.

SEC. 17. And so, if a coachman go in his master's livery and hire horses in his name, which his master uses, the latter will be bound to pay for the hire of the horses; although he has agreed with the coachman to pay him a large salary to provide horses, unless the owner of the horses had some notice that the coachman hired them on his own account, and not for his master. *Rimell* vs. *Sampayo*, 1 C. & P. 254.

SEC. 18. Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it. *Lickbarrow* vs. *Mason*, 2 T. R. 70.

SEC. 19. So, an authority on the part of the agent will be implied, even in cases which are not within the scope of his ordinary business: *provided*, it be shown that he has, on former occasions, exercised the same authority, and that his principal knew or had the means of knowing that fact. *Davidson* vs. *Stanley*, 3 Scott N. R. 49. It is not necessary, in order to constitute a general agent, that he should have done before an act, *in specie*, the same with that in question. If he have usually done things of the same general character and effect, with the assent of his principal, that is enough. *Bank of Lake Erie* vs. *Norton*, 1 Hill (N. Y.), 502.

SEC. 20. A contract made by an agent, as such, is, in law, the contract of the principal. A sale by a factor con-

stitutes a contract between the principal and purchaser. *Golden* vs. *Levy*, 1 Domat, 528; 15 *Me.* 340; 4 *Greenl.* 542. *Qui facit per alium facit per se.* The agent is considered merely as the medium by which the contract is effected; and his assent is merely the assent of his principal. Where a person is employed by an agent he may call upon the *principal* for payment for the services rendered, and he may do so, although he knows that the agent has discharged the demand to the principal and received the amount, unless he has agreed to discharge the principal and rely upon the responsibility of the agent. *Lincoln* vs. *Battelle*, 6 Wend. 475.

SEC. 21. He need not therefore be a person *sui juris;* and hence, infants, married women, persons attainted, or outlawed, or aliens, are competent to act as agents.

SEC. 22. But a person incapacitated to purchase in his own name by reason of his standing in a confidential relation to the seller, cannot purchase as the agent of another. *Hawley* vs. *Cramer*, 4 Cowen, 717.

SEC. 23. An agent's authority may be *determined* either:

1st. By the express revocation thereof by the principal. *Dunlap's Paley's Agency*, 184, *et seq.* A power of attorney by deed may be revoked by a parol order. *Brookshire* vs. *Brookshire*, 8 Ired. 84. Or by renunciation of the agency on the part of the agent himself. *Russell on Factors*, 311, 314.

2d. By the death or bankruptcy of the principal or agent. *City Council* vs. *Duncan*, 3 Brevard, 386; *McDonald* vs. *Black*, 20 Ohio, 185.

3d. By efflux of time, where a specific period is fixed, either by express agreement or by the usage of trade, for the execution of the act to be done by the agent. *Story on Agency*, Sec. 480.

4th. By the execution of his commission whereby the agent becomes *functus officio*. *Blackburn* vs. *Scholes*, 2 Camp, 341, 343; *Smith* vs. *Rice*, 1 Bailey, 648. There are other ways in which the authority of an agent may be determined, as by marriage of the principal being a *femme sole*, by marriage of a *femme sole* agent, by the lunacy or insanity of the agent, by renunciation by the agent, by the bank-

ruptcy of the principal and by a sale of the subject matter of the agency by the principal. *Story on Agency*, 185.

SEC. 24. But the mere happening of the above events will not in each case, operate *per se* as a complete revocation of the agent's authority. Thus, if the principal countermand the authority of the agent, such countermand will not take effect as to third persons until it is make known to them.

SEC. 25. So, where a servant had power to draw bills on his master's name, and was afterwards turned out of his service, it was ruled: "that if he draws a bill in so little time that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bills in those cases shall bind the master. ——— vs. *Harrison*, 12 Mod. 346.

SEC. 26. So, where a servant who had been used to raise, receive and pay, money for his master, borrowed two hundred guineas in his master's name, after he had quitted the service; the lender, who did not know of his discharge, recovered against the master by the direction of Kneeling, C. J., and this direction was approved of by the whole court, on a motion for a new trial. *Monk* vs. *Clayton*, Mol. 270.

SEC. 27. And it is said, that a sale or purchase by an agent, even after the death of his principal, if made without notice of that fact, will bind the representatives of the latter. *Story on Agency*, Sec. 496; See *Cassady* vs. *McKinsey*, 4 Watts & Serg. 282.

SEC. 28. Nor is the authority given to an agent revokable in all cases at the mere will of the party who conferred it. Thus, it is not in general revocable after a part executed thereof by the agent. *Russell on Factors*, 312.

SEC. 29. As between the principal and agent, Mr. Justice Ware, in *United States* vs. *Jarvis* (Davies, 287), held, that the former may at any time, revoke and withdraw the power of his agent at his pleasure, and without notice. But if the agent has entered on the business of the agency, and has fairly, in the ordinary course of business and in good faith, entered into any engagements, or come under any liabilities

in the prosecution of the proper business of the principal, before notice of the revocation of the agency, the principal will be bound to indemnify him, unless the agent had given just cause for such revocation. In the same manner the agent may, at any time, renounce the agency, but then he is bound to give the principal reasonable notice of his intention before hand, to enable him to procure another agent; and if he does not, he will be bound to indemnify the principal for any loss he may sustain.

SEC. 30. And so, if there be an *interest* coupled with the authority; that is, if an agreement be entered into on a sufficient consideration, whereby an authority is given, for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. *Briston* vs. *Taylor*, 2 Stark. 50, 51. Whether a power, coupled with an interest, is revoked by the death of the person giving the authority, see the reasoning of Marshall, C. J., in *Hunt* vs. *Rousmanieo* (8 Wheat. 174), where he says: "We held it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself." "The interest or title in the thing, being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act, in his own name; the act of the substitute, therefore, which in such a case, is the act of the principal, to be equally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him; such a power necessarily ends with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be executed, such person acts in his own name. 10 *N. Hamp.* 156; 3 *Watts & Serg.* 14.

SEC. 31. It has, however, been decided, that where a factor, to whom goods have been consigned generally for sale, has subsequently made advances to his principal, on the credit thereof, which advances the latter has, on request, neglected to repay, the factor's authority to sell does not become by reason of such unpaid advances irrevocable as an authority coupled with an interest, so as to entitle him to

sell the goods, contrary to the orders of the principal. *Smart* vs. *Sanders*, 5 C. B. 895.

SEC. 32. But it has been held in Massachusetts, that a commission merchant who has received goods to sell at a certain limited price and has made advances upon them, has a right to reimburse himself by selling them at the fair market price, though below the limit, if the consignor has refused, upon application and after a reasonable time, to repay the advances. *Parker* vs. *Brancher*, 22 Pick. 40. So in New Hampshire. *Frothingham* vs. *Everton*, 12 N. Hamp. 239.

SEC. 33. A factor who makes advances on goods consigned to him may maintain an action, before the goods are sold, to recover the money advanced, unless there is an agreement to the contrary. *Upham* vs. *Lafavour*, 11 Metc. 174; *Story on Agency*, 58. If one voluntarily undertakes to do a particular piece of business for another, though he acts gratuitously, he is bound to obey the orders of his principal, and is liable in damages for the consequence of a breach of instruction. *Walker* vs. *Smith*, 1 Wash. C. C. 152. A promise of indemnity to an agent is implied from his employment as such. *Powel* vs. *Newbury*, 19 Johns. 284.

Extent of Authority and Liability of the Principal.

SEC. 34. If a servant or agent be accredited and invested by his master with authority to act for him in all his business of a particular kind, or if the agent being himself engaged in a particular trade or business, he will in each case be held to be, with reference to his employment, *a general agent* (*Russell on Factors*, 75), and the public having no means of knowing what are—in any particular case within the general scope of the agent's powers—the wishes and directions of the principal, the latter will be liable, even although his orders be violated. 1 *Metc.* 193; 6 *How.* (*Miss.*), 217, 221.

SEC. 35. In such a case, the principal, having for his own convenience induced the public to consider that his agent was possessed of general powers, is bound by the exercise, on the agent's part, of the authority which he has thus allowed him to assume.

SEC. 36. Where the agent, on behalf of his principal, performs an unauthorized act, yet if the principal has put the agent in a position to mislead innocent parties, he is responsible to them. *Davidson* vs. *Dallas*, 8 Cal. 227.

SEC. 37. The statement or representations of an agent made at the time of a transaction which is within the scope of his authority, is evidence against the principal himself. *Neely* vs. *Naglee*, 23 Cal. 152.

SEC. 38. *Act beyond Power of Agency.*—The agent cannot, in the exercise of the power delegated, bind the principal by any act beyond the power or beside it, though it is competent for him to perform such subordinate acts as are usually incident to or necessary to effectuate the object expressed. *Blum* vs. *Robertson*, 24 Cal. 127.

SEC. 39. But there is a distinction to be observed between the authority of a special agent, which the person dealing with him not only has a right, but is bound to know, and *private instructions* given him respecting the mode and manner of executing his agency, intended to be kept secret, and not communicated to those with whom he may deal, concerning which it would of course be useless to inquire. Such *private instructions* are not to be regarded as limitations upon his authority; and notwithstanding he may disregard them, his act, if otherwise within the scope of his agency, will be valid and binding on his employer. This subject is clearly and amply discussed by Parker, Ch. J., in *H.* vs. *T.*, 10 N. Hamp. 538. See, also, 12 *How.* (*U. S.*) 358, 359.

SEC. 40. These rules have been illustrated as follows: If a person keeping a livery stable and having a horse to sell, direct his servant not to warrant him, still the master will be liable on the servant's warranty, because the latter was acting on the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and the servant.

SEC. 41. But if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter were to act contrary to the orders given him, the purchaser could only have recourse to the person who actually sold the horse, because the servant was not

acting within the scope of his employment. 1 *Esp.* 111; 6 *Hill*, 337.

SEC. 42. After notice is given that the agency has ceased, the principal's liability ceases. This notice he may give by making known the contents of a written agreement which terminates the agency. *Van Ouzen* vs. *Star Quartz M. Co.*, 36 Cal. 571.

SEC. 43. A party having notice of the contents of a written agreement has notice of its legal effect. 36 *Cal.* 571.

Of Factors.

SEC. 44. There are some rules recognized in relation to factors which do not apply to ordinary agents. The factor may sell his principal's goods in his own name; he may bring an action for the price of the goods, and if he has a lien upon the price for his compensation, it will not be prejudiced by any set-off which the purchaser may have against his principal, and he may bring an action in his own name for injuries to the goods or to obtain their possession, from one who has wrongfully taken or detained them. The reason for these rules is, that the factor has an interest in the goods for his commissions and advances, and in all cases where an agent has an interest in the goods coupled with his agency, the same rules will apply to him. *Cowen's Treatise*, 81.

SEC. 45. Factors or consignees are not liable to an action until a demand or instructions to remit. They are not bound to take upon themselves the risk of remittance, but may await the orders of their principals. 8 *Cal.* 457.

A demand or instructions to remit are necessary, because until such demand is made or instructions are given, the consignee cannot know what disposition his principal may wish to be made of the proceeds, whether remitted or paid to third parties, or held subject to his orders. 8 *Cal.* 457.

It is the duty of a consignee to render an account of his sales, but he is not bound to take upon himself the risk of remittance, nor can he throw such risk upon his principal without orders. But where the agreement of the consignee is to sell the goods and send the money to his principal, as the remittance of the proceeds upon sale enters into the

agreement upon which the consignment is made, there can be no occasion for any further instructions, or any demand to put the consignee in default. The cause of action accrues in such case upon the neglect of the consignee to remit the proceeds immediately upon the sale, and no demand is necessary. The remittance would be at the risk of the principal, if made in the ordinary and customary mode by which funds are at the time transmitted. 8 *Cal.* 457, 458.

SEC. 46. Where instructions to remit are originally given, but the consignee forwards no account of sales, the statute of limitations runs against the principal, only from the time when he obtains knowledge of the sales and of receipt of the proceeds by the consignee. To hold that the statute of limitations runs against the principal under such circumstances, would be to permit the consignee to take advantage of his own wrong. Nor does the fact that the principal had, at an earlier period, commenced an action in another state, where he resided, against the consignee to recover the proceeds, averring in his complaint, upon information and belief, that a sale had been made, fix that as the time when the liability accrued, so far as the statute of limitations is concerned. 8 *Cal.* 458.

SEC. 47. If the plaintiff waives the *tort*, and sues defendants as factors, they must be considered as acting under his authority, and plaintiff can only recover the *net proceeds* of sales effected by them after deducting necessary charges and commissions. 3 *Cal.* 463.

SEC. 48. Where there is nothing in the business of consignees to make them technical factors, third parties are not bound to know that they acted as factors in the particular case. 7 *Cal.* 26.

SEC. 49. If a factor is in possession of property and clothed with the external evidences of ownership, and it is part of his usual business to buy and sell goods on his own account, such apparent ownership gives him power to sell or pledge. The rule, as to the lack of power in factors to pledge goods of their principals, is only applicable where the party pledging is technically a factor, where his only business is to sell goods consigned to him for that purpose, wherefore, on account of his notorious employment, all the

world is charged with notice that the goods in his possession are the property of others, and that he has power only to sell them and no power to pledge them. 6 *Cal.* 385.

SEC. 50. The rule that a factor cannot pledge the goods of his principal is, in this state, confined to technical factors when the rights of third parties are involved. 11 *Cal.* 393.

SEC. 51. That a factor cannot pledge, as security for the payment of his individual debt, the goods of his principal consigned to him for sale, has been the established doctrine of the common law for more than a century. It was first declared in *Patterson* vs. *Fash* (2 Strange, 1178), as early as 1743, and has been uniformly adhered to ever since in the court of England, except where it has been modified by acts of parliament. It is also the settled law in all our sister states of the union, where the legislature has not interfered to make a change. In this state, without any legislative action on the subject, a limitation in the application of the doctrine to a special class of factors has been asserted by this court, which we shall hereafter particularly notice. The doctrine of the common law results from the fact that the factor is but an agent, and as such can only bind his principal when his acts are within the scope of his authority. A power to sell for the benefit of his principal, can in no way be stretched into a power to pledge for his own benefit. Nor does it make any difference whether the party taking the pledge was ignorant as to the extent of the factor's authority or that the factor was not the real owner of the property. "Whoever deals with an agent constituted for a special purpose," says Kent, "deals at his peril, when the agent passes the precise limits of his power." 2 *Comm.* 611. "The doctrine," says the same distinguished jurist, "that a factor cannot pledge, is sustained so strictly that it is admitted that he cannot do it by indorsement and delivery of the bill of lading any more than by delivery of the goods themselves. To pledge the goods of the principal is beyond the scope of the factor's power; and every attempt to do it under color of a sale, is tortious and void. If the pawnee will call for the letter of advice or make due inquiry as to the source from whence the goods came, he can discover (say the cases) that the possessor held the goods as factor and not as vendee;

and he is bound to know, at his peril, the extent of the factor's power." See *Daubigny* vs. *Duval*, 5 T. R., 504; *McCombie* vs. *Davies*, 6 East, 538; *S. C.*, 7 East, 5; *Pickering* vs. *Bush*, 15 East, 38; *Warner* vs. *Martin*, 11 How. (U. S.) 224; *Kennedy* vs. *Strong*, 14 Johns. 128; *Buckley* vs. *Packard*, 20 Johns. 421; *Stearns* vs. *Wilson*, 3 Denio, 473; *Kinder* vs. *Shaw*, 2 Mass. 398; *Odiorne* vs. *Maxcy*, 13 Mass. 178; *Hoffman* vs. *Noble*, 6 Metc. 68, 74; *Holton* vs. *Smith*, 7 N. H. 446; *Skinner* vs. *Dodge*, 4 Hen. & Munf. 432; *Howes* vs. *Doodridge*, 1 Rob. (Va.) 143; *Benny* vs. *Rhodes*, 18 Mo. 147; *Benny* vs. *Pegram*, 18 Mo. 191; *Benito* vs. *Mosquera*, Basw. 427. The limitation in the application of the doctrine in this state to which we have referred, was first asserted in *Hutchinson* vs. *Bonrs* (6 Cal. 385). It was there held that the doctrine is only applicable where the party pledging is "technically a factor," that is, "where his only business is to sell goods consigned to him for that purpose." In *Glidden* vs. *Lucas* (7 Cal. 26), the same limitation is recognized, and in *Horr* vs. *Barker* (11 Cal. 393), it is distinctly affirmed. In none of these cases are any authorities cited by the court in support of the limitation. In the last case Mr. Justice Burnett states that the harshness and injustice of the rule, as originally established in England, induced the court, in *Hutchinson* vs. *Bours*, to confine the rule to a technical factor. But Justices Ellenborough and Le Blanc, from whose observations in *Martin* vs. *Coles* (1 Maule & Selwyn, 145), Mr. Justice Burnett concluded that they considered the rule a hard one, expressly held that the law was too firmly settled against the right of the factor to pledge, to be disturbed by the court. "Perhaps," said Ellenborough, "it would have been as well if it had been originally decided that where it was equivocal whether a person was authorized to act as principal or factor, a pledge made by such person free from any circumstances of fraud, was valid. But it is idle now to speculate upon this subject, since a long series of cases has decided that a factor cannot pledge." The case of *Martin* vs. *Coles* was decided in 1813, and "with the long series of cases" which preceded and have since followed it, all recognizing and affirming the rule, it may be said with equal truth now as then, that it is "idle to speculate" as to any

different rule which might have been originally established. Judges of great distinction have not hesitated to declare their approbation of the existing rule. Thus, Mr. Chief Justice Abbott, in *Queiroz* vs. *Trueman* (3 Barn. & Cress. 349), expressed the opinion that "it is one of the greatest safeguards which the foreign merchant has in making consignments of goods to be sold" in England. And in the same case Mr. Justice Bayley said, that he could not help thinking that the rule had operated much to increase the foreign commerce of the kingdom by holding out to consigners that if the factor went beyond the authority vested in him, it should not work a prejudice to his principal. "I entirely concur," continued the justice, "in saying that in my judgment this, as a measure of policy, ought not to be altered. The rule is founded upon a very plain reason, viz: That he who gives the credit should be vigilant in ascertaining whether the party pledging has or has not authority so to deal with the goods; that knowledge may always be obtained from the bill of lading and letters of advice." Whatever doubts may be expressed by different judges as to the expediency of the rule against the power of factors to pledge, there have been none as to the existence of the rule as we have stated it. It is as well settled as any rule of law can possibly be, and in no instance have we found any departure from it, except in cases cited from this court. The limitation sought in those cases to be engrafted upon the doctrine—in other words, the distinction sought to be made between "a technical factor," that is, one whose "only business is to sell goods consigned to him for that purpose," and a factor who, at the same time, does business on his own account—is not recognized in any of the authorities in England or America, but is repudiated, either expressly or impliedly, in all of them wherever the point arises. In *Martini* vs. *Coles*, which we have already referred to, the factor, Vos, was a general merchant, and as such had been in the habit of employing the defendants as brokers in the sale of West India produce. The plaintiff consigned to him a quantity of coffee for sale, and sent him a bill of lading for the same in the usual form, providing for the delivery of the coffee to him or his assigns, he or they paying freight.

The factor indorsed the bill of lading, and delivered the goods to the defendants; and on the faith of these and other goods placed in their hands, they advanced various sums to him; and at the time they had no knowledge that the factor was not the owner of the coffee. Trover having been brought for the coffee, the defendants urged that, as the factor was also a general merchant, and as such had usually employed them, and as the bill of lading was made out to himself, he might reasonably be mistaken for the owner of the goods. But the court, per Le Blanc, J., said: "Whether it might not originally have better answered the purposes of commerce to have considered a person, in the situation of Vos, having the apparent symbol of property, the true owner in respect of that person who deals with him under an ignorance of his real character, is a question upon which it is now too late to speculate, since it has been established by a series of decisions that a factor has no authority to pledge, whether the person to whom he pledges has or has not a knowledge of his being factor. Here Vos was clearly factor for the plaintiff; and the circumstances of the goods having been made deliverable by the bill of lading to Vos or his assigns, cannot make any difference, since it conveyed to him no farther authority over the goods than the party who consigned them intended to clothe him with." In *Kinder* vs. *Shaw* (2 Mass. 398), the goods of the plaintiffs were placed for sale with one Carter, who kept a retail shop. To raise money, Carter pledged the goods, with other goods of his own property, to the defendants, who were ignorant of the plaintiff's interest. Trover having been brought for the goods, the defendants argued that as Carter was not known to them as the factor of the plaintiffs, and as they had no ground to suspect the goods to be the property of the plaintiffs or of any one else other than Carter, who kept an open shop in which these goods were exposed to sale with his own, they had a right to treat with him as the real owner. But the court gave judgment for the plaintiffs, Mr. Chief Justice Parsons observing "that the court, considering the question of importance to the mercantile part of the community, had looked into the case with attention, and were all of opinion that a factor had no au-

thority to pawn goods which have been intrusted to him for sale. The rights of the principal and factor depend on the law merchant, which has been adopted by the common law. By this law a factor is but the attorney of his principal, and he is bound to pursue the powers delegated to him." In several of the other cases cited above, the factor was also engaged in business on his own account. In this state there are few persons acting as factors who do not at the same time have some business of their own in buying and selling; and the practical effect of the decision in *Hutchinson* vs. *Bours*, if sustained, would be to establish as a general rule that a factor may pledge without authority the goods of his principal for his own debt, and to make the very limited class of "technical factors" a mere exception to that rule. The principle upon which the decision in *Hutchinson* vs. *Bours* proceeds, as we infer from the facts of the case, is that the possession of personal property by a person engaged in business on his own account, is sufficient evidence of his ownership to protect parties dealing with him as the real owner. For this principle there is no warrant in the law. Possession of personal property is only *prima facie* evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency. "The law is clearly laid down," says Le Blanc, J., in *Pickering* vs. *Busk* (15 East, 88), "that the mere possession of personal property does not convey a title to dispose of it, and which is equally clear, that the possession of a factor or broker does not authorize him to pledge." The principle that no one can be divested of his property without his consent, and the maxim that no one can transfer a better title than he has himself, control all questions arising as to property of which a transfer is attempted, with the exceptions stated. The effect of possession as evidence of ownership is subordinate to those principles. *Covill* vs. *Hill*, 4 Denio, 327. The consent of the owner to a disposition of his property may be inferred from acts, as well as given in direct terms. It may be inferred when the owner gives such evidence of the authority of disposal, as usually accompanies such authority, according to the custom of trade

and the general understanding of business men. Thus, the delivery of goods to a merchant engaged in the sale of articles of a similar kind, is such evidence of the bestowal of the right to dispose of the same as to protect the purchaser from the possessor. The possession under such circumstances is evidence, not that the possessor is owner, but that he has received authority from the owner to sell. The authority to pledge would not be inferred from possession in such case, for to pledge is a special transaction outside of the usual course of business, and consequently outside of the protection extended to ordinary transactions of commerce. From the views expressed and the authorities cited, it follows that the limitation asserted in *Hutchinson* vs. *Bours*, and *Horr* vs. *Barker*, cannot be maintained. Those decisions are anomalous in their character and in conflict with the law upon the authority of factors, as it is recognized by the United States Courts and the courts of every state of the union where the legislature has not interfered to make a change. We do not hesitate to overrule them, for it is of the highest importance to those engaged in commerce in this state that the decision of this court on commercial questions should be in conformity with the adjudications on like questions of the courts of the principal commercial communities of the world. The disposition of the question raised as to the authority of Darling to pledge the goods for the recovery for value of which the present action is brought, renders it necessary to consider the other points made by the appellant. Upon the facts found, the judgment of the district court must be reversed and that court directed to enter judgment for the defendant. 19 *Cal.* 72–77.

When the Agent is Personally Liable.

SEC. 52. Upon the principle that the contract of an agent is the contract of the principal; as agent, he is not liable upon any agreement into which he enters, merely in his representative capacity. *Ex parte Hartop*, 12 Ves. jr., 349, 352. But wherever an agent enters personally into a contract, or pledges his own credit by concealing his principal—even if the party dealing with him had the means of finding out the principal (*Thompson* vs. *Davenport*, 9 Barn. &

Cress. 78)—or otherwise, this gives the other party a right of action against him; and where he enters in his own name into an agreement, in writing, he cannot relieve himself from his liability, even by showing that at the time such agreement was made and signed, the other contracting party knew that he was only an agent in the transaction. *Higgins* vs. *Senior*, 8 M. & W. 834; 13 *Mo.* 191.

SEC. 53. If one draws a bill in his own name, without stating that he acts as agent, unless when acting for the government, he is personally liable, although he directs it to be paid out of a particular fund. *Newhall* vs. *Dunlap*, 14 Maine, 180; 2 *Miles*, 254.

SEC. 54. Thus, if an agent, by deed under his own hand and seal, covenant "for himself, his heirs," etc., for the act of another, he is personally liable upon his covenant, although he describes himself in the deed as covenanting "for and on behalf" of another person. 5 *East*, 148.

SEC. 55. So, where the defendant, by a written agreement expressed, to be made by himself "on behalf of A B," of one part, and the plaintiff of the other part stipulated that *he*, the defendant, would execute to E, the plaintiff, a lease of certain premises," which, as it was proved to belong to A B: Best, C. J., held, that the defendant was personally liable, observing that there was no distinction between deeds and parol agreements in this respect. *Norton* vs. *Herron*, 1 R. M. 229.

SEC. 56. But a distinction has been generally regarded as existing between deeds and simple contracts, in reference to the forms of expression and of execution necessary to bind the principal. Greater latitude of construction and proof has been admitted in the case of simple contracts than of deeds. In contracts not under seal, it will be sufficient, where the agent intends to bind his principal and not himself, if it appear in such contracts that he acts as agent. *Townsend* vs. *Hubbard*, 4 Hill (N. Y.), 351; 8 *Pick.* 56; 23 *Wend.* 435; 22 *Wend.* 324; 1 *Greenl.* 231, 339.

SEC. 57. But even in the case of sealed instruments no precise form of words are necessary to bind the principal. The capacity in which the agent acts must appear from the face of the instrument; where this is the case no more is

needed. *Magill* vs. *Hinsdale*, 6 Conn. 464; 2 *Conn.* 680, 682.

SEC. 58. So, where the defendants, who were directors of a joint-stock newspaper company, gave a promissory note in the following form: "On demand, we jointly and severally promise to pay to Mr. L H or order, the sum of two hundred dollars, for and on behalf of the Wesleyan newspaper association," and this note was signed by them as directors, it was held, that the words, "we severally promise," were equivalent to we *personally* promise; and that the defendants were, therefore, personally liable on the note. *Healey* vs. *Storey*, 3 Exch. 3. The same doctrine was maintained in *Bradlee* vs. *Boston Glass Co.*, 16 Pick. 347. But see, in *Rice* vs. *Gore*, 22 Pick. 158.

SEC. 59. A demand on an agent for an account of the proceeds of goods sold by him, should be made at his residence, and sufficient opportunity should be given him for payment. *Hall* vs. *Peck*, 10 Vt, 474; 11 *Vt.* 477.

CHAPTER VII.

ASSIGNMENTS.

	SECS.		SECS.
STATUTORY PROVISIONS	1– 2	EQUITABLE ASSIGNMENTS	39–40
WHO MAY ASSIGN AND TAKE ASSIGNMENTS	3– 6	EQUITABLE OFFSETS, RULES OF.	41–42
WHAT MAY BE ASSIGNED	7–20	NOTICE OF ASSIGNMENT	43–44
WHAT CANNOT BE ASSIGNED	21–25	ASSIGNMENT FOR THE BENEFIT OF CREDITORS	45–53
WHAT WILL OPERATE AS AN ASSIGNMENT	26–34	ASSIGNMENT OF JUDGMENT	51–63
INTERPRETATION AND EFFECT OF	35–38	ASSIGNMENT, WHEN VOID	58–57

Statutory Provisions.

SECTION 1. All bonds, due-bills and other instruments of writing, not negotiable, hereafter made by any person, body politic or corporate, whereby such person promises or agrees to pay any sum or sums of money, or articles of personal property, or any sum of money in personal property, or acknowledges any sum of money or articles in personal property, to be due to any other person, shall be taken to

be due and payable, and the sum of money or articles in personal property therein mentioned, shall, by virtue thereof, be due and payable to the person to whom the said bond, bill, or other instrument in writing, is made. *Gen. Laws*, 371.

And such bond, due-bill, note, or other instrument in writing, not negotiable, made payable to any person, shall be assignable by indorsement thereon under the hand of such person and his assignee, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively. *Pub. Laws*, 372.

In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration before due. *Pr. Act*, Sec. 5.

SEC. 2. *Original Owner—Trade-mark Assignable.*—Any person who has first adopted and used a trade-mark or name, whether within or beyond the limits of this state, shall be considered its original owner, and the ownership may be transferred in the same manner as personal property, and shall be entitled to the same protection by suits at law, as other personal property. *Gen. Laws*, 7143.

Who may Assign and take Assignments.

SEC. 3. An administrator of an estate in New York has the right to assign, for a valuable consideration, a judgment obtained there by the intestate in his lifetime, and against a person who has since removed to this state. 12 *Cal.* 181.

SEC. 4. Where personal property is wrongfully detained, the owner may assign his title thereto, and the assignee may maintain an action therefor. 22 *Cal.* 139.

SEC. 5. A right of action for the wrongful taking and conversion of personal property, is assignable, and under the provisions of the code the assignee can recover upon the same in his own name. 22 *Cal.* 139.

SEC. 6. When A, by agreement between him and B, as-

sented to by C, becomes liable to pay to the latter a debt originally due to him from B, the assignee of C may maintain an action for the debt in his own name against A. 22 *Cal.* 187.

What may be Assigned.

SEC. 7. A written contract not to run boats on a certain line of travel, and on failure to comply with such contract, to pay a specified sum, is an instrument in writing for the payment of money, and is made assignable by our laws. 6 *Cal.* 261.

SEC. 8. A defendant is estopped from denying that a contract was assignable, if he was notified of the assignment, and received from the plaintiff, the assignee, the full sum of money which the assignor contracted to pay. 6 *Cal.* 261.

SEC. 9. The language of section five of the practice act, as amended by the act of eighteen hundred and fifty-five, which says: "or thing in action not arising out of contract," means a thing in action not arising out of *express* contract. Even this construction of the clause, and allowing it to have effect in giving the right of assignment in cases of contract where such right did not exist before, is only by implication, for there is no statute which directly gives the right, or directly repeals the former rule. But this implication cannot be extended so as to embrace choses in action arising out of torts. 6 *Cal.* 457.

SEC. 10. The legal property in a chose in action, remains in the assignor notwithstanding the assignment. 1 *Cal.* 82, 83.

SEC. 11. A bill of lading may, like all other contracts, be assigned, and the property in the goods therein mentioned transferred to the assignee; and it matters not whether such assignment be made in full, or in the abbreviated form of a simple indorsement. But that is a very different thing from negotiability (like that of a bill of exchange). 1 *Cal.* 79.

SEC. 12. If a bill of lading be assigned by the consignee *bona fide*, for a valuable consideration, and without notice of any adverse interest, the property in the goods mentioned therein becomes vested in the indorsee. 1 *Cal.* 81.

SEC. 13. *Assignment of Debt not in Existence.*—An assignment of a debt not in existence, is not valid at law; such an assignment creates an equity only. 35 *Cal.* 378.

SEC. 14. *Damages caused by Trespass.*—A claim for damages caused by a trespass on land, is assignable, and the assignee may maintain an action to recover the same. 32 *Cal.* 590.

SEC. 15. A contract, where the owner of a stallion leases him for a season for a sum of money agreed on, and reserves the right to have the horse cover nine mares during the season, is assignable; and the assignee, who is also the purchaser of the horse from the owner, is entitled to all the benefits arising out of the contract. 27 *Cal.* 248.

SEC. 16. The creditor has not the right to assign the debt in parcels, and thus, by splitting up the cause of action, subject his debtor to the costs and expenses of more suits than the parties originally contemplated. But when the debtor himself does not object, no other party can object for him. 8 *Cal.* 536.

SEC. 17. *When the Demand for the Purchase Money is Sold or Assigned.*—The indebtedness for the purchase price of real estate is the subject for an execution or attachment, levy and sale, or of private transfer, but the equitable interest that attaches to the property conveyed, by virtue of the indebtedness in the hands of the vendor, is extinguished by a transfer of the indebtedness. 36 *Cal.* 313.

SEC. 18. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable; and such assignment gives a right of action in the name of the assignee. 9 *Cal.* 325.

SEC. 19. An order drawn upon defendant, for an amount due from the defendant, is a *prima facie* assignment of the debt due. Even if it was only for part of a debt, no one could make the objection but the defendants. 7 *Cal.* 260, 12 *Cal.* 97; 14 *Cal.* 408. And the drawees having notice of such assignment, are liable to the payees for the amount, without an express promise to pay it.

SEC. 20. A contract to perform work on a street in San Francisco may be assigned, and the assignee, if he fulfills the conditions of the same, can enforce it; and if such con-

tract has been assigned, and the assignee performs the contract, the warrant when issued for the work may be delivered to the original contractor, who may make demand for its payment. 31 *Cal.* 240.

What Cannot be Assigned.

SEC. 21. *Causes of Action not Assignable.*—Where there is no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount, no action can be maintained therefor in assumpsit, nor can the claim be assigned so that the assignee may sue. 10 *Cal.* 63.

SEC. 22. Causes of action arising out of personal torts which do not survive to the personal representatives of a party, are not assignable. *Oct. T.* 1854; 3 *Kernan*, 322; 36 *Barb.* 270.

SEC. 23. The equitable lien which a vendor of real estate, after an absolute conveyance, retains upon the property for the unpaid purchase money, is not assignable. 21 *Cal.* 172, 178, 227.

SEC. 24. *A Mortgage.*—Independent of the debt it is given to secure, a mortgage has no assignable quality; and one who receives an assignment of the debt for which it was given, takes nothing by the assignment. 30 *Cal.* 685.

SEC. 25. A cause of action for a malicious prosecution, is not assignable. 22 *Cal.* 173.

Mere personal torts, as assault and battery, slander and the like, die with the person, and cannot be assigned. 22 *Cal.* 173.

What will Operate as an Assignment.

SEC. 26. Any act amounting to an appropriation of a debt, will constitute an assignment of it—no particular form of transfer is essential. 18 *Cal.* 126.

SEC. 27. Where the order is given for a valuable consideration, and for the whole amount of the demand against the drawee, though worthless as a bill, it operates as an assignment of the debt or fund against which it is drawn. 12 *Cal.* 92.

SEC. 28. An assignment of an account by indorsement

of the word "assigned," signed by the owner of the account, is sufficient. 6 *Cal.* 247.

SEC. 29. Such an assignment being sufficient, it was not error to permit the plaintiff—the assignee of the account—to amend on the trial the assignment, by inserting the words "for value received, I hereby assign the within account," instead of the word "assigned," the additional words being mere surplusage. 6 *Cal.* 247.

SEC. 30. The mere signing an assignment without delivery, is insufficient. 7 *Cal.* 388.

SEC. 31. An instrument under seal may be assigned by writing, without seal. 34 *Cal.* 135.

SEC. 32. An assignment of shares of stock, in a corporation formed under the act of 1853, by a mere delivery of the certificate of stock without a transfer on the books of the corporation, is invalid as against a subsequent purchaser of the stock at sale on execution against the assignor, without notice of the assignment. 20 *Cal.* 529.

SEC. 33. An order drawn by a creditor on his debtor is *prima facie* evidence of an assignment of the debt, *pro tanto*, and if accepted will bind all parties. 7 *Cal.* 258.

SEC. 34. The good faith of the assignment being questioned, evidence going to show a previous pledge of the fund, is admissible. 7 *Cal.* 258.

Interpretation and Effect of.

SEC. 35. *Suits by Assignee of a Claim.*—An absolute assignment of a demand enables the assignee to sue for and recover the whole debt, even though by the assignment he acquired only a portion of the demand. 29 *Cal.* 150.

SEC. 36. Assignors of unliquidated demands are not placed, with reference to incidental matters auxiliary to the trial of a cause, in any worse position than the parties to the record. 17 *Cal.* 570.

SEC. 37. Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights or extinguishment. 9 *Cal.* 80.

Where A received an assignment of stock in a corporation, and the stock was subsequently attached under a judg-

ment against the vendor, and afterwards the stock was regularly transferred to A, who then obtained an assignment of the judgment under which the stock was attached—the assignment of the judgment at once merged in the higher right, and A, as regarded third parties, became the absolute owner of the stock. 9 *Cal.* 78.

The shares being subject to the lien, and A being the owner of the stock, he was compelled to discharge the lien of the judgment to save the stock. This he did by taking an assignment of the judgment. By taking this course, instead of paying the judgment, he retained the right to issue execution against the vendor. But as to the lien upon the property attached, the assignment had the effect to extinguish it. 9 *Cal.* 81.

SEC. 38. Under the twelfth section of the act concerning corporations, passed April 22d, 1850, no transfer of stock is good against third parties, unless the transfer be made upon the books of the company. An assignment, by mere delivery, of the certificates of stock, is not sufficient to defeat the rights of an attaching creditor. The legislature intended to protect the public from the frauds which might be perpetrated by a sale or hypothecation of the certificates passing the legal or equitable title, while the books of the company induced credit to the vendor, by holding him out to the world as the owner of such stock. 5 *Cal.* 189.

Equitable Assignments.

SEC. 39. The assignee of a judgment is only the holder of an equity, with the right to use the judgment and the name of the plaintiff to enforce it, and he stands in the shoes of the assignor as to all defenses which existed against the judgment between the parties to it. *Wright & Co.* vs. *Levy*, 12 Cal. 257.

A certificate of deposit of eighteen hundred dollars, payable to the order of V, was indorsed, sold and delivered, by V to L, for four hundred dollars. Payment was then at once demanded of the maker, and notice of protest served on V. Subsequently, L transferred the certificate to plaintiff: *Held*, that plaintiff can recover of V only the four hundred dollars received by him, the certificate being

subject, in the hands of plaintiff, to all the equities between the indorser and indorsee. *Coye* vs. *Palmer*, 16 Cal. 158.

Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no actual existence, but vest in possibility: *provided*, they are fairly made and are not against public policy; and a contract for such interest will take effect as an assignment when the subjects to which they refer have ceased to vest in possibility and have ripened into reality. *Pierce* vs. *Robinson*, 13 Cal. 123.

On suit upon an assigned account, the defendant may plead any defense he may have against the assignor before notice of the assignment—not as a counter claim, as that would be in violation of section forty-seven, but must be set up as an equitable defense, on the ground that the assignee takes the demand subject to an existing equity. *Duff* vs. *Hobbs*, Jan. T. 1862.

SEC. 40. The defendant was indebted to the Empire Mining Company, who were indebted to the plaintiff, and it was agreed by all the parties that the defendant should pay to the plaintiff the amount of this indebtedness. If the rights of the plaintiff were to be determined by the rules of the common law, it might be a question whether the action could be maintained in its present form, but there is no doubt that the transaction amounted to an equitable assignment of the debt, and under our practice the only mode in which this assignment can be enforced is by an action in the name of the assignee for the recovery of the debt. We have but one form of action for the enforcement of private rights, and with certain exceptions the statute requires that every action shall be prosecuted in the name of the real party in interest. Cases of assignment are not included in these exceptions, and in the form of the remedy no distinction exists between legal and equitable rights. In this respect, the two classes of rights are placed precisely upon the same footing, and must undergo the same remedial process for their enforcement.

It is not essential to the validity of the assignment that any particular form of transfer should have been adopted. An appropriation of the fund was all that was necessary,

and any act amounting to such an appropriation was sufficient to constitute an assignment of the debt. This accords with the rule laid down by Judge Story in his work on equity jurisprudence, and we have no statutory provision derogating from the effect of this rule. 18 *Cal.* 127, 128.

Equities and Offsets, Rules of.

SEC. 41. In the following cases, and under the following circumstances, a defendant may set off demands which he has against the plaintiff:

1st. It must be a demand arising upon judgment, or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond, or other contract having a penalty, the sum equitably due, by virtue of its condition only, shall be set off.

2d. It must be due to him in his own right, either as being the original creditor or payee, or as being the assignee or owner of the demand.

3d. It must be a demand for real estate sold, or for personal property sold, or for money paid, or services done; or if it be not such a demand, the amount must be liquidated, or be capable of being ascertained by calculation.

4th. It must have existed at the time of the commencement of the suit, and must then have belonged to the defendant.

5th. It can be allowed only in actions founded upon demands which could themselves be the subject of set-off, according to law.

6th. If there be several defendants, the demand set off must be due to all of them jointly.

7th. It must be a demand existing against the plaintiff in the action, unless the suit be brought in the name of a plaintiff who has no real interest in the contract upon which the suit is founded; in which case, no set-off of a demand against the plaintiff shall be allowed, unless as hereinafter specified.

8th. If the action be founded upon a contract (other than a negotiable promissory note or bill of exchange) which has been assigned by the plaintiff, a demand existing

against such plaintiff, or any assignee of such contract, at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, may be set off to the amount of the plaintiff's debt, if the demand be such as might have been set off against such plaintiff or such assignee, while the contract belonged to him.

9th. If the action be upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff, after it became due, a set-off to the amount of the plaintiff's debt, may be made of a demand existing against any person or persons who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor, while the note or bill belonged to him.

10th. If the plaintiff be a trustee for any other, or if the suit be in the name of a plaintiff, who has no real interest in the contract upon which the suit is founded, so much of a demand existing against those whom plaintiff represents, or for whose benefit the action is brought, may be set off in an action brought by those beneficially interested.

11th. But if such a suit be brought by the assignee of an insolvent, imprisoned, absent, concealed or absconding debtor, no set-off shall be allowed of any debt. *Cowen's Treatise.*

SEC. 42. *Set-off, how Defeated.*—Until a payment becomes mature, a set-off may be defeated by the assignment of the claim of the opposite party, though the latter be insolvent, and his demands have not become payable when assigned. *Meyers* vs. *Davis*, 22 N. T. R. 489.

Notice of Assignment.

SEC. 43. A sold to B a bill of goods to arrive on a certain vessel. B paid part of the purchase money, and was to pay the balance as soon as the vessel arrived. B assigned the contract to C, who within a reasonable time after the arrival of the vessel, tendered the balance of the money to A, and demanded the goods: *Held*, that C was entitled to the goods, and no notice of the assignment was necessary to charge A; and it was no defense, that before A had notice

of the assignment, attachments in favor of the creditors of B had been served upon him, and that he sold the goods and paid the proceeds to the attaching creditors after such notice, without the assent of C. If the assignee had allowed the party to answer the attachment, and the money to be made by the process of the court, the rule would be different. But the defendant undertook to adjust this matter between himself and the attaching creditors, to the absolute exclusion of the plaintiff's rights. Section five of practice act does not extend to a case like the present. 5 *Cal.* 325, 326.

SEC. 44. Where shares of stock are assigned by mere delivery of certificates, without a transfer on the books of the corporation, notice of such assignment must be given, to render it valid against subsequent purchasers at sale on execution against assignor. 20 *Cal.* 529.

Assignment for the Benefit of Creditors.

SEC. 45. No general assignment by said partnership, in case of insolvency, or where their goods and estate are insufficient for the payment of their debts, shall be valid, unless it provide for a distribution of the partnership property among all the creditors, in proportion to the amount of their several claims. *Gen. Laws*, 4820.

SEC. 46. A party being about to fail, can assign a bill of lading of goods to arrive, not yet paid for, to another, in trust, to devote the proceeds to the payment of the vendor, and such assignment is good against attaching creditors. The transfer of the bill of lading constitutes the assignee the agent of the vendor, and this act being for the benefit of the vendor, his assent must be presumed. The transfer is, therefore, equivalent to a re-delivery of the goods to the vendor, and to a rescission of the contract of purchase before the goods have reached the hands of the vendee. It renders a stoppage *in transitu* unnecessary, and indeed takes away that right, for there is a rescission before there could be a stoppage. The fact that the language of the transfer implies the right on the part of the assignee to sell the goods, can have no influence, for if he sold, it would be as agent of the vendor. 6 *Cal.* 514, 519.

SEC. 47. Where a person takes an assignment of personal property, under an agreement with the assignor, that out of the proceeds he will pay a debt due from the assignor to a third person, the assignee stands to the creditor in the relation of a trustee, and is liable to a direct action by the creditor for the debt. 20 *Cal.* 126.

The proceeds are received to the use of the creditor, and the law creates the privity necessary to the maintenance of the action. 20 *Cal.* 126.

SEC. 48. After a voluntary assignment for the benefit of creditors, in order to enable the assignee to recover goods belonging to the assignor, from consignees holding the same under a claim for advances and commissions, the demand must be made in the name and by the authority of the assignee, accompanied by notice and evidence of such authority. A demand by the assignor, and a refusal by the consignees, will not enable the assignee to maintain his suit for a conversion. 4 *Cal.* 406.

SEC. 49. A non-negotiable *chose in action* created by the immediate parties to it, for the purpose of defrauding creditors, cannot be impeached in the hands of an innocent assignee by the creditors of the debtors making such *chose in action.* 12 *Cal.* 257.

SEC. 50. It is no defense to an action on an account assigned the plaintiff, that the account was not assigned to plaintiff until after the time alleged in the complaint, or that it was assigned for a nominal consideration by one of two partners, without consulting his copartner. These matters do not affect defendant's liability. 17 *Cal.* 570.

Assignment of Judgment.

SEC. 51. A judgment is property, which may be purchased like any other property. The purchaser is bound to inquire into the defenses of the debtor. He has the means to do this; but he could not be held to inquire into latent equities existing in the hands of third persons. The law, when it made this sort of property subject to sale, gave it the protection which extends to all other property. It is only by force of the statute of frauds that the judgment or sale of it could be avoided at the suit of the creditor, or by

force of common-law principles, of which the statute is an affirmance. But neither this statute nor these principles affect an innocent purchaser, nor an innocent purchaser of equities, any more than of legal estates. Between the parties, the assignee of equities stands in the place of his assignor, with no better rights; but as to the claims of third persons, the purchaser of an equity stands unaffected by frauds of which he has no knowledge, express or constructive. 12 *Cal.* 262, 263.

SEC. 52. The purchaser of a judgment, although he buys in good faith, and for a valuable consideration, takes the same subject to any right of set-off existing between the parties at the time of his purchase. 23 *Cal.* 596.

An assignee of a judgment is deemed to have notice of all matters disclosed by the record and proceedings in the action in which the judgment was rendered; and where that judgment or the proceedings therein disclose an equitable right of set-off existing in favor of the defendants against the plaintiff, the assignee cannot claim to be a *bona fide* purchaser. 23 *Cal.* 596.

SEC. 53. In the purchase of a judgment, the rule of *caveat emptor* applies, so far as third parties are concerned, in the same manner as in the purchase of any other personal property. If the assignor has no title, the purchaser will take care whether he have notice of a former sale or not. 25 *Cal.* 539.

It is not necessary that the assignment of a judgment should be under seal. 25 *Cal.* 539.

SEC. 54. The purchaser of a judgment entered by default takes it, subject to the right of the defendant upon showing sufficient grounds to have the default and judgment set aside, and to be let in to defend the action; and in this respect stands in no better position than his assignor. 23 *Cal.* 255.

SEC. 55. The assignment of a judgment which is void because the amount for which it was rendered was beyond the jurisdiction of the court, carries with it the debt on which it was obtained. 25 *Cal.* 190.

SEC. 56. He who purchases a void judgment, and contracts with the assignor to pay him therefor, and afterwards

uses the judgment in payment for property of the defendant, sold under executions issued on this and other judgments, cannot, when sued on his contract for the purchase money, avoid his liability on the ground that the judgment was void and of no value to him. 25 *Cal.* 190.

SEC. 57. Where A appeals from a judgment against him, and B becomes his surety on the appeal bond, and A, to secure B for his liability on the appeal bond, assigns to B a liquidated demand held by A against third parties, the liability of B in the appeal bond is a sufficient consideration to support the assignment made to him by A. 23 *Cal.* 596.

Assignments, when Void.

SEC. 58. An assignment for the benefit of certain parties, who have undertaken to guarantee the payment of such creditors of the assignor, as consent to an extension of time or substitution of security, is void. *Groschen* vs. *Page*, 6 Cal. 138.

SEC. 59. A partial or special assignment is equally void as a general assignment, and being void because it delays and hinders creditors, as well as because it is against the policy of the statute, cannot be sued by the intervention of third parties who voluntarily assume to do that for the indulgent creditors which the debtor himself could not do. 6 *Cal.* 138.

SEC. 60. *Fraudulent Assignor cannot Sue.*—One who makes an assignment of property for the sole purpose of hindering, delaying and defrauding, his creditors, cannot maintain an action against the assignees to compel a re-assignment of it, or judgment for its value if a re-assignment cannot be had; nor can a purchaser from the assignor, who buys with full knowledge of such fraudulent assignment, maintain such action. 25 *Cal.* 653.

SEC. 61. Where an account is verbally assigned to a creditor, with the understanding that in case he collects it, he will credit his claim with a portion thereof and return the balance to the assignor, but if nothing is received no sum is to be credited, the assignment is void, and the assignee cannot sue thereon in his own name. 7 *Cal.* 388.

SEC. 62. That the trustees employ the partner assigning

to aid them in winding up the concern and pay him, and allow his wife some furniture, etc., is not proof of fraud in the assignment, there being no evidence that these benefits were promised at the time of the assignment. 13 *Cal.* 242.

SEC. 63. *Assignment of a Sheriff's Certificate of Sale as Security.*—One who receives an assignment of a sheriff's certificate of sale of land as security against the liability for debts of the judgment debtor, with an agreement that he will cancel the same when the debts are paid, and his liability is discharged, ceases to have any interest in the certificate when the debts are paid; and if he afterwards obtains a sheriff's deed, neither he nor his assignee with notice acquire any title to the land. 30 *Cal.* 135.

CHAPTER VIII.

BAILMENT, CONTRACTS OF.

SECTION 1. A bailment is a delivery of a thing in trust to another, for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. *Story on Bailments*, 2. The one who delivers the thing is the *bailor;* the one who receives it the *bailee.*

SEC. 2. There are five classes of bailments :

1st. *Deposit*, where goods are delivered to another to be returned on demand, and without recompense. In such a case, no action will lie until after the demand of the property, by the bailor, or by some person for him, *having authority to make the demand*, and a refusal by the bailee to deliver it. 9 *Johns.* 361.

2d. *Mandate*, as where the bailee receives the goods with a promise that he will carry them to some place, or that he will perform some act to them without reward, as where one generously takes your trunk to carry to town and leaves it at some place there for you; or kindly receives of you a horse to break to the saddle or harness.

3d. A loan for use, as when one borrows my gun or my horse, to use without paying for the use.

4th. *A pledge*, is where goods are delivered to a creditor, to be retained by him until his debtor pays him. Actual delivery is necessary to make a pledge valid. *Story on Bailm.* 197.

5th. *Letting to hire*, is a bailment where compensation is to be given for the use of the thing bailed, or for labor or services about it. This species of bailment is of three kinds: 1. The hiring a thing for use, by which the bailer for a compensation acquires its temporary use, as where I hire my friend's horse to ride for a day. 2. The delivery of a thing to a bailee to have something done with it, as where I deliver clothes to a washerman to have them cleansed, or my horse to a horse-shoer to have him shod. 3. As where I deliver goods to be transported by the bailee for a reward. 7 *Cow.* 499.

SEC. 3. In determining the responsibility of bailees for the violation of the contract of bailment, a distinction is made between: 1st. *Slight neglect.* 2d. *Ordinary neglect;* and 3d. *Gross neglect.* Slight neglect, is the want of such diligence as *very* circumspect and *cautious* persons use in the care of their own goods, and which is called *extraordinary care.* Ordinary neglect, is the want of ordinary diligence, or the omission of the care which every man of common prudence takes of his own concerns, called *ordinary care.* Gross neglect, is the want of even slight diligence, or of such care as every man of common sense, however inattentive, takes of his own property, and is esteemed in law—*violation of good faith. Cow. Treatise,* 63.

SEC. 4. A bailee who derives no benefit from the bailment, as in case of a deposit or mandate, is responsible only for gross neglect. One who alone receives benefit from the bailment, as in loans for use by the bailee, without compensation, is responsible for slight neglect. Where the bailment is beneficial to both parties, as in case of pledging or letting to hire, the bailee is answerable for ordinary neglect, unless where there is a special agreement in relation to it, which is permitted with some exceptions. All bailees are answerable for actual frauds, even though the contrary be stipulated. *Cow. Treatise,* 63.

SEC. 5. Bailees are not responsible for a loss occasioned by *inevitable accident*, or *irresistible force*, except it be provided for by special agreement. *Cow. Treatise*, 63.

SEC. 6. The following rules may be deduced from the principles laid down in the three last sections:

1st. A depository is responsible for gross neglect.

2d. If the character for care-taking of the bailee is known to the bailor, and he takes as good care of the bailor's goods as he does of his own, the bailee is not responsible.

3d. A mandatory to carry, is only responsible for gross neglect or a breach of good faith.

4th. A mandatory to perform a work is bound to use a degree of diligence, adequate to the performance of it. 3 *Johns.* 170; 4 *Johns.* 84.

5th. One cannot be compelled to perform a promise to receive a deposit or mandate, nor to pay damages for refusing to keep such a promise, because there is no consideration for the promise. But if the bailee has received the deposit or mandate, and neglects to perform the contract of bailment, he is liable. 5 *Term*, 143.

6th. A borrower for use, is liable for slight neglect.

7th. A *pledgee* or *pawnee*, is answerable for ordinary neglect.

8th. The hirer of a thing, is responsible for ordinary neglect.

9th. A workman for hire must answer for ordinary neglect of the goods bailed, and apply as much skill as the undertaking demands.

10th. One who hires his care and attention, is responsible for ordinary neglect.

11th. A carrier by land or water, is answerable for ordinary neglect.

SEC. 7. The following are exceptions to the rule laid down in the foregoing section:

1st. One who officially engages or voluntarily undertakes to do a thing, is responsible for ordinary neglect.

2d. If one is over persuaded to execute a mandate, and undertakes it against his will, an ordinary exertion of his ability only can be required of him.

3d. All bailees are responsible for losses or injuries to the thing bailed, after a demand is made for its return.

4th. A borrower and a hirer, are responsible at all events if they keep the thing longer than the time stipulated for, or use it otherwise than was agreed on at the time of receiving it. *Cow. Treatise*, 64.

5th. A pawnee, and depositary are responsible if they use the thing pawned or deposited, unless it be something that is a charge upon them, as a horse or a cow; in such a case he may milk the cow or use the horse, but if he receives any profit from their use over and above the costs of keeping, it must be applied to the pawnee's debt. *Story on Bailm.* 67–8.

6th. An innkeeper is chargeable for the goods of his guests, if delivered to him or his servant, or if they be deposited where it is usual to deposit such things, and which is designated by the innkeeper or his servant. 21 *Wend.* 282.

7th. A common carrier—by which term is meant, one who undertakes for hire, to transport from place to place the goods of such persons as choose to employ him; is responsible for loss or damage to the goods intrusted to him, unless occasioned by the act of God or the public enemies. The rule is the same whether the carriage is by land or water. *Cow. Treatise*, 65.

8th. A carrier of passengers and their baggage, is responsible for the baggage, if lost, although no distinct or separate price be agreed on for its transportation. The price of its transportation being, in contemplation of law, included in the fare. But the baggage must be necessary articles, and such as are convenient for travelers to carry. If it be money, it must be such an amount as travelers usually carry to defray expenses. The liability continues until the baggage is delivered to the owner. A delivery upon a forged order will not excuse the carrier. 25 *Wend.* 459; 26 *Wend.* 591.

The following sections contain the decisions of the supreme court of California on the subject of bailments:

SEC. 8. Bailment is the delivery of a thing in trust for some special object or purpose, upon a contract, express or implied, to conform to the object or purpose of the trust. 8 *Cal.* 43.

The objects of bailments may be as various as the transactions of men; they are made for the purpose of sale, hire, safe-keeping, etc. In a large majority of transactions, they are made for the purpose of a disposition or conversion of the property. As, for example, bailments by commission merchants or factors, in which a conversion is the very object of the trust. If in such cases, after a sale or conversion of the property, the agent or factor should lose or misapply the proceeds, an indictment would not lie against him, under the statute concerning bailees, although he might probably be indicted for embezzlement, if the legislature thought proper to make that a penal offense. 8 *Cal.* 43.

All conversions of money or property, by a bailee, are not *ipso facto* unlawful or felonious under our statute. The legislature intended to use the word in a limited sense, as designating bailees to keep, to transfer, or to deliver. The cases generally arise upon contracts, and the circumstances constituting the offense. 8 *Cal.* 43, 44.

SEC. 9. Where a redemptioner under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. 14 *Cal.* 232.

In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptionee. 14 *Cal.* 232.

SEC. 10. A pledge is a bailment which is reciprocally beneficial to both parties. The law therefore requires of the pledgee the exercise of ordinary diligence in the care and custody of the goods pledged, and he is responsible for ordinary negligence. What will amount to ordinary negligence must depend on the circumstances of the transaction and the character of the pledge. In general, it may be defined to be the neglect to exercise that degree of care which an ordinarily prudent man usually bestows upon his own property of a like description. 6 *Cal.* 647. When bailors agree that goods shall be stored in a certain warehouse at their risk and expense, their removal by an agent of the bailees, though without their knowledge, charges them for the safe keeping of the goods after their removal,

and they are responsible for any damage to the goods caused by their removal to an insecure or improper place of storage. The keeper of the warehouse, as the agent of the bailees, is responsible to them for any damage resulting from his unauthorized acts. 6 *Cal.* 648.

SEC. 11. A party, by pledging negotiable securities, transferable by delivery, loses all right to the securities, when transferred by the pledgee in good faith to a third party. If the pledge is of a certificate of stock, which may pass by delivery, a *bona fide* purchaser, or subsequent pledgee, may hold the stock against the real owner; otherwise, no person receiving such security would be safe. In the first place, the person receiving would be obliged to ascertain (what in most instances it would be impossible to ascertain) whether the security belonged to the person from whom he received it, or was only deposited as security with him by some other person. Although warrants drawn by officers of a government upon its disbursing officers, might not be strictly called evidences of indebtedness, yet the owner having once pledged them with another, reposing confidence in his pledge, any person subsequently acquiring them in good faith from such pledge, must hold them against the original owner. The pledge in such a case should be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises. 5 *Cal.* 261, 262.

SEC. 12. Collateral security may be held in as many various ways, and subject to as many different conditions, as there is variety in the objects and character of contracts; thus, personal property, merchandise or stock, may be held as collateral security, in the nature of a mortgage, in which the parties could agree that, in case of non-payment, the right of property should become absolute, and that without notice or foreclosure; or, it may be held as a pledge, the right of restoration upon the payment of the debt being reserved to the debtor; and it is competent for the parties to contract, that the goods or stock thus pledged as collateral may be sold with or without notice, and upon non-payment, without demand of payment. So, also, goods or stock, or other securities, may be held by the creditor

under an absolute transfer, in trust for the debtor, with the power in the creditor to sell and reimburse himself for advances made, or to provide himself from time to time with funds to meet the additional demands of the debtor, and to pay his drafts; or, in other words, it is competent for parties to foresee these contracts to suit themselves, and courts of law will be governed by the plain import of the language of the contract in each particular case. 3 *Cal.* 159, 160.

SEC. 13. In case of a naked pledge as collateral security, the authority to sell, when not expressly given, cannot be exercised without demand of payment and notice. 3 *Cal.* 161.

SEC. 14. A pledgee of chattels has a right at common law, if the pledge is not redeemed within the stipulated time, to sell the property pledged, at auction, by giving public notice of the time and place of sale; and if the sale does not satisfy the debt, he may recover the deficiency from the pledgor by an action at law. 26 *Cal.* 577.

SEC. 15. The common-law right of the pledgee to sell the pledge upon the default of the pledgor, and thereafter bring his action for any balance remaining unsatisfied, is wholly unaffected by chapter one of title eight of the practice act. 26 *Cal.* 578.

SEC. 16. Where personal things are pledged for the payment of a debt, the general property and the legal title always remain in the pledger; the special property and the possession, or right of possession, being in the pledgee, the pledger having the right to restoration of the property on payment of the debt. 3 *Cal.* 162.

Where the plaintiff drew several drafts upon the defendant, who held a deposit of securities for the payment of a debt, directing him to pay them "from the proceeds of the securities in his hands;" this was held to give an authority to the plaintiff to sell the securities deposited to meet the drafts; and a sale made under such authority is good, without notice to the plaintiff of the time and place of sale, or previous demand of payment. 3 *Cal.* 158.

SEC. 17. A party placing money in the hands of another for the purpose of making a bet on an election, in the name

of the bailee, but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the purpose for which it was deposited. 11 *Cal.* 343.

The bailor does not part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains, as between him and the principal, the money of the principal. 11 *Cal.* 343.

Upon the retraction of the wager, the right to the possession of the money is in the agent or bailee, and he may maintain an action for it where the bailor interposes no objection. 11 *Cal.* 343.

Nor can an attaching creditor of the bailee, levying on the money in the hands of a stakeholder with whom it has been deposited by the bailee, claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the bailor by reason thereof. 11 *Cal.* 343.

The stakeholder being informed of the rights of the bailor, was bound to protect those rights by resisting in some way, the pleadings against him as a garnishee, the bailor being no party thereto; nor will he be protected by a judgment improperly entered against him, ordering him to pay the money to the attaching creditor. 11 *Cal.* 343.

SEC. 18. The general rule is, that in an action by the bailor, the bailee will not be allowed to set up title in a third party. 9 *Cal.* 574. There is, however, an exception to this rule in cases where the bailor's possession was obtained by fraud. 9 *Cal.* 574. Thus, where the defendant was employed to sell certain goods then in plaintiff's possession, and the goods were claimed by the assignees of a bankrupt, and notice of the claim given to defendant before the sale, the plaintiffs having obtained possession by means of a fraudulent collusion with the insolvent was admitted as a defense. 9 *Cal.* 574.

If the bailee received the goods from the bailor, innocently, under the impression made by the bailor that he is

the owner thereof, or has the right to dispose of them in the manner he is doing, and therefore promises to return the goods to the bailor, such a promise ought not to be regarded as binding, because obtained through a false impression made willfully by the bailor; and in every such case the goods should be delivered to the true owner, especially if he demanded the same, instead of the wrongful bailor. 9 *Cal.* 574, 575.

It may be correct enough to hold, where the real owner of the property does not appear to assert his right to it, that the carrier or bailee should not be permitted, of his own mere motion, to set up a defense against the bailor, such right for him. But it would be repugnant to every principle of honesty to say that, after the right owner has demanded the goods of the bailor, the latter shall not be permitted, in an action brought against him by the bailor for the goods to defend against his claim, by showing clearly and conclusively that the plaintiff acquired possession of the goods, either fraudulently, tortiously, or feloniously, without having obtained any right thereto. A different rule would be productive of great hardship to the bailee in such cases; for when the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril, and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods by the person setting up such adverse title. 9 *Cal.* 575.

Thus, where the defendant, a master of a vessel, received certain goods of plaintiff, to be delivered at a certain place, which he failed to do, and in the action brought thereupon he offered to prove that the goods belonged to a third party, who had forbidden such delivery, and that plaintiff had obtained possession of the goods by fraud, it was held that he was entitled to prove such facts. 9 *Cal.* 573.

CHAPTER IX.

COMMON CARRIERS.

	SECS.		SECS.
DEFINITION	1- 4	WHO ARE	35-47
OBLIGATIONS OF	4-34	LIABILITY OF	48-73

Definition.

SECTION 1. A common carrier of goods is one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place. Steamboat companies, railway companies, masters of vessels, bargemen, ferry-men *Smith* vs. *Stewart*, (3 Pa. St. R. 342), proprietors of stage-coaches and stage-wagons, which ply from place to place (*Beekman* vs. *Shouse*, 5 Rawle, 179), truckmen, cartmen, porters who carry parcels in the same town from place to place; indeed, all persons who make it a business to carry goods for any who may wish to employ them, for a reward or hire, are considered as common carriers.

SEC. 2. But a forwarding merchant, who has no interest in the conveyances which carry away the goods intrusted to him, is not a common carrier (*Platts* vs. *Hibbard*, 7 Cow. 497); nor the owner of a cart or carriage, let for a specific space of time, to go to such places as the employer may direct, as a cab-driver or a hackney-coachman, such is not a carrier. *Brind* vs. *Dale*, 8 Car. & P. 207.

SEC. 3. And a distinction must be made between one who carries goods only occasionally, although he may receive hire, and a common carrier—a man who is employed for hire, *pro haec vice* only, and does not make the carriage of goods his constant employment, is not liable as a common carrier. *Satterlee* vs. *Groat*, 1 Wend. 272.

Obligations of Common Carriers.

SEC. 4. Common carriers of goods are: 1. Required to fulfill certain obligations arising from the nature of their employment. 2. Liable for certain losses. 3. Entitled to certain rights either under an express or implied agreement. Each of these will be separately examined.

SEC. 5. *Of the Obligations of Common Carriers.*—A common carrier is obliged to receive and carry all goods offered to him for transportation, when he has room for such goods, upon receiving a just compensation or hire, and, unless he has a valid excuse, he is liable to an action for not doing so. *Bac. Ab. Carriers;* 1 Saund. 312.

SEC. 6. The proper time to deliver them to him, is when he is about to set out on his accustomed journey. *Lane* vs. *Cotton*, 1 Ld. Raym. 652.

SEC. 7. On receiving the goods, he is bound to take the utmost care of them; to obey the directions of the owner in respect to them; to carry them safely to the proper place of destination; to make a right delivery of them there in proper time, according to the usage of trade, or in the course of business. He is required to provide proper conveyances; if with wagons, good horses and drivers; if by water, good vessels and a sufficient crew (*Bell* vs. *Read*, 4 Binn. 127; *Hart* vs. *Allen*, 2 Watts, 115), and to proceed, without deviation, to his place of destination—for a voluntary deviation will render him responsible for inevitable accidents. *Davis* vs. *Garrett*, 6 Bing. 716.

SEC. 8. *Of the Liability of a Common Carrier—For what Losses.*—By the common law, a common carrier is in general liable for all losses which may occur to property intrusted to his charge in the course of business, unless the loss has happened: 1. By the act of God, or inevitable accident. 2. By the act of the enemies of the United States. 3. By the act of the owner of the property. 4. Because the carrier has given notice limiting his liability; or, 5. Because he is protected by some rule of law.

SEC. 9. *Of the Act of God.*—By the phrase: "An act of God," is meant those natural accidents arising from physical causes, which cannot be prevented; such as lightning, earthquakes, tempests, etc. It is something in opposition to the act of man. *Forward* vs. *Pittard*, 1 T. R. 33. For losses by the act of God, a carrier is not responsible according to the maxim "the act of God works an injury to no man." The loss in such cases falls upon the owner.

SEC. 10. When the carriage is by water, the bill of lading usually contains a proviso that the carrier shall not be lia-

ble for "perils of the sea." The exact import of this expression is not clearly settled. In a strict sense, it signifies the natural accidents peculiar to the sea; but in more than one instance, it has been held to extend to events not attributable to natural causes. For instance: The meaning of these words has been held to include a capture by pirates on the high seas; in another, a loss occasioned by collision of two ships, where no blame was imputable to either, or not to the injured ship. *Marsh* vs. *Blythe*, 1 McCord, 360. A loss by jettison, when no blame is imputable to the master, is also considered a peril of the sea. *Jones on Bailm.* 108; 1 *Caines*, 43. Numerous other accidents have also been classed as perils of this kind.

SEC. 11. The words *perils of the sea*, on the western waters of the United States, signify perils of the river. *Jones* vs. *Pitcher*, 3 Stew. (Ala.) 176.

SEC. 12. *Of the Enemies of the United States.*—By enemies, it is understood public enemies, with whom the United States are at open war, and not merely robbers, thieves or other private depredators. Losses by the latter must be borne by the common carrier, while he is excused in case the loss has been sustained from the former. It would be unreasonable to hold a carrier responsible for the acts of a public enemy, which the government, which is bound to protect the common carrier, could not resist; but the same reason does not apply to the case of common robbers and thieves, because the carrier could easily defraud his employers by colluding with them, and, to prevent this, common carriers are made responsible for the act of such malefactors.

SEC. 13. *Loss Occasioned by the Owner.*—If in consequence of the negligence of the owner in not putting his goods in a fit condition for the journey, any loss arise, it will fall on him, unless the carrier has by implication or expressly assumed the care of them in such condition. *Beck* vs. *Evens*, 16 East, 245; *Steward* vs. *Crawley*, 2 Stark. 324.

SEC. 14. Fraud in this, like every other case, will render the contract a mere nullity. If, therefore, the owner of the goods use fraud or artifice to deceive him, and in consequence of it his risk is increased or his vigilance is lessened,

the loss which may follow, must be borne by the owner. *Edwards* vs. *Shessath*, 1 East, 604.

SEC. 15. Whether a bare concealment would be such a fraud, seems doubtful, but if the carrier make an inquiry, and a false answer is given, he will not be liable for the loss. *Riley* vs. *Thorne*, 5 Bing. on Ins. 217.

SEC. 16. *Of Notices.*—Attempts have been made by carriers to limit their responsibility, by giving notices that they will not be responsible for the carriage of certain goods without loss, or that those goods are carried at the risk of the owner. Though the validity of these notices has been established to a certain extent in England, under the controlling influence of certain statutes (*Story on Cont.* Sec. 750), in the United States they have generally been declared void as being contrary to the policy of the law, for the undertaking of a common carrier is to carry safely, and the notice is to exempt him from this obligation. *Hollister* vs. *Newlin*, 19 Wend. 234; *Cole* vs. *Goodwin*, 19 Wend. 251. In Pennsylvania, a carrier may *limit* his common-law responsibility by a particular agreement, but the exception will be strictly interpreted; he cannot exempt himself from *all* responsibility. *Atwood* vs. *Reliance Company*, 9 Watts. (Pa.) 88.

SEC. 17. *Exemption of the Carrier by a Rule of Law.*—The reason why a common carrier is responsible for the loss of goods is, that they are completely under his control, and the policy of the law renders him liable for their loss on this account. But when the reason of a rule ceases, the rule itself should have no force. Accordingly, when a carrier has no longer the control of property, he cannot be made responsible. This is the case when intelligent beings as slaves, are the property which he has engaged to transport. The rule in cases of this kind is, that the carrier is responsible only for want of care and skill. *Boyce* vs. *Anderson*, 2 Pet. 150; *Clark* vs. *McDonald*, 4 McCord, 223.

SEC. 18. *Of the Beginning and End of the Risk of the Carrier.*—The carrier's liability commences the moment the goods are delivered to him or to his authorized agent for carriage, and accepted either expressly or by implication. *Selway* vs. *Holloway*, Ld. Raym. 46.

But the goods must be completely under his sole control, for if an agent be sent with them to take especial care of them, his liability does not attach. If, however, a servant happens to go with them, but there is no intention to let him meddle with the care of the goods, the carrier will be answerable for the loss. *Marsh on Ins.* B. 1, C. 7, S. 5.

SEC. 19. The liability of the carrier ends the moment the goods are deposited at their place of destination, and when no express agreement has been made, such place may be determined by usage, for usage enters into every contract, unless there is an express agreement to the contrary. *Chickering* vs. *Fowler*, 4 Pick. 371.

SEC. 20. A delivery on the usual wharf will, in such case, be sufficient: *provided*, notice be given to the consignee. 1 *Rawle*, 203; 4 *Pick.* 341). In such case, the delivery must be made at some reasonable time, for an offer to deliver at an unreasonable time will not discharge the carrier from his responsibility. *Hill* vs. *Humphreys*, 5 Watts & Serg. 123. But when there is neither agreement nor usage, the goods must be delivered to the consignee in person, (*Story Bail.* Secs. 508, 539, 553), and the moment the latter has possession the carrier's risk is ended.

SEC. 21. *Of the Rights of a Common Carrier.*—A common carrier of goods is entitled in all cases to demand the price of carriage before he receives the goods; and, if not paid, he may refuse to take charge of them; if, however, he receives them without the hire being paid, he may afterward recover it by action, and he has a lien on the goods till he is paid, unless he waives it; and if once the right is waived the lien is gone, and cannot be resumed.

SEC. 22. The consignor or shipper is commonly bound to the carrier for the hire or freight of goods. *Moore* vs. *Wilson*, 1 T. R. 659.

SEC. 23. The consignee also becomes bound for it whenever he expressly promises or receives the goods with a bill of lading containing the usual clause, that the carrier will deliver the goods to the consignee, "he or they paying freight." *Abbott Ship.*, Part 3, C. 734.

SEC. 24. The price or consideration for carrying goods on land is called the *hire;* for carrying them on water, *freight.*

SEC. 25. *Of Carriers of Passengers.*—Carriers of passengers may be distinguished into : 1st, carriers by land ; and 2d, carriers by water.

SEC. 26. *Of Carriers by Land.*—These must be considered with regard to : 1st, their obligations ; 2nd, their liability ; and 3d, their rights.

SEC. 27. *Of their Obligations.*—They are bound to carry all passengers who offer themselves, against whose personal character and conduct there are no just objections : *provided*, they have sufficient accommodations, and the passage money has been offered. *Pichford* vs. *Grand Junction Railway Co.*, 8 M. & W. 372.

SEC. 28. They have no more right to refuse a passenger than an innkeeper has to turn away a guest. *Boetherton* vs. *Wood*, 3 Brod. & B. 54.

SEC. 29. They are also required to provide sufficient carriages, with suitable horses and harness; careful drivers, of reasonable skill and good habits; not to overload the carriage, either with passengers or baggage; to take care of the baggage which each passenger is allowed to have; to stop at the usual places, and allow such time as is commonly employed for taking refreshments; to use all ordinary precautions for the safety of passengers on the road; to carry passengers to the end of their journey; to put them down at the usual places of stopping, unless there has been a special contract to the contrary, and then to put them down at the place agreed upon. *Story Bailm.* Secs. 591–598; *McKinney* vs. *Neil.*

SEC. 30. *Of the Liabilities of Carriers of Passengers.*—Their liabilities toward passengers arise from a neglect to use extraordinary care and diligence to carry safely those whom they take in their coaches; but they are not responsible for accidents, when they use all reasonable skill and diligence. *Ware* vs. *Gary*, 11 Pick. 106.

SEC. 31. For the baggage of the passengers they are liable as common carriers. *Hollister* vs. *Newlin*, 19 Wend. 234; *Coles* vs. *Goodwin*, 19 Wend. 251.

SEC. 32. *Of the Rights of Carriers of Passengers.*—The rights of such carriers are first, to demand and receive their fare at the time the passenger takes his seat, and if the fare

be but partially paid, and the passenger does not attend at the time of the departure his seat may be given to another; but if the whole fare be paid, he has a right to come in at any place on the journey for which he has paid. *Ker* vs. *Mountain*, 1 Esp. 26. The carrier has a lien on the baggage of his passenger for his fare or passage money, but not on the person of the passenger, nor the clothes he has on. *Abbott on Shipping*, Part 3, C. 3, S. 11.

SEC. 33. *Of Carriers of Passengers by Water.*—Carriers of passengers by water are in general bound by the same rules as carriers by land, and liable for the same faults both as to the person and to the baggage of the passenger.

SEC. 34. Salutary regulations have been made by Congress, as to the amount of provisions or sea-stores which must be taken on board of vessels bound to or from the United States, intended for the carriage of passengers, and as to the number of passengers which vessels may take. *Act of Congress*, March 2d, 1819, and act of 22d of February, 1847.

Who are Common Carriers.

SEC. 35. Proprietors of stage-coaches are common carriers. 13 *Cal.* 602.

SEC. 36. The law regards ferrymen as common carriers, and has imposed upon them the same duties and liabilities. 5 *Cal.* 364.

SEC. 37. Under the general railroad law, all railroads are compelled to act as common carriers for the conveyance of all passengers and property that may come to their road for that purpose. 23 *Cal.* 324.

SEC. 38. The towing of a vessel out to sea by a steamer, is the transportation of property, without resorting to any other than the necessary construction arising from the generic and common meaning assigned to the word "transport," and therefore brings the case within the law of common carriers, who are defined as persons engaged in the transportation of goods for hire. 6 *Cal.* 470.

SEC. 39. Whether a steam-tug is a common carrier or not, she holds herself out to the world for engagement in a business for hire, requiring prudence, skill, and the use

of adequate means to perform the contracts which she undertakes, and this constitutes a stipulation of their existence, which by clear construction, enters into the contract, and forms a part of it. 6 *Cal.* 471.

The fact that the owner of the ship lost while being towed to sea, was the agent for the owners of the steam-tug, does not relieve the latter from any of the obligations under which they contract with others. 6 *Cal.* 471.

SEC. 40. In an action for damages brought by a passenger against a stage company, for injuries to plaintiff, caused by carelessness of the driver in overturning the coach: *Held*, that the fact that before the accident the driver was informed that a passenger was to get out at plaintiff's destination, and that after the accident the agent of defendants informed the driver of a coach which had been provided to convey the passengers from the scene of the overturning, that the plaintiff was to stop at the destination designated, was a sufficient recognition of the fact that the plaintiff was a passenger, to establish *prima facie* the allegation of contract to safely carry. 6 *Cal.* 233.

SEC. 41. The fact that a vessel, lost while being towed out to sea, is insured, does not divest the owner of the right of action for damages for her loss, especially in the case of a mere partial insurance, for in such a case the abandonment by the owner only transfers his interest so far as that interest is concerned by the policy. 6 *Cal.* 470, 471.

A recovery by the owner in such an action will bar another action for the same cause, and therefore the defendant cannot raise the objection that the action is not brought by the real party in interest. 6 *Cal.* 471.

SEC. 42. An innkeeper, like a common carrier, is the insurer of the goods of his guest, and is bound to keep them safe from burglars and robbers without, as well as from thieves within, his house; but he can be held to this strict liability only for such goods as are brought into his house by travelers in the character of guests. As, in order to entitle the plaintiff to recover, it is necessary for him to establish his character of guest in the inn of the defendant; so also it is equally necessary that it should appear that his goods were taken there in the capacity of guest. 2

Stephen's Comm. 133. The liability of the innkeeper results from the relation of guest in which the traveler stands to him, and extends only to those things which properly pertain to him in that relation. It does not necessarily follow that the strict responsibility can be imposed on an innkeeper for all property which his guest may choose to bring into the inn, after he has been received *infra hospitium;* or that the latter may make the former a compulsory depository of any amount of goods or treasure which, during his sojourn in the inn, he may desire to keep secure. The innkeeper is bound by law to receive the traveler and his goods, and for a refusal, in case he has sufficient accommodations for him, he is liable not only to an action on the case for the private damage, but to indictment for the public wrong. 3 *Blackstone's Comm.* 164; 4 *Stephen's Comm.* 296, note *n.* Inns are instituted for passengers and wayfaring men; and the keepers thereof can be held to the strict legal liability only for such goods as are brought into their inns by travelers in the character of guests. It would be too great a responsibility if that liability could be extended so as to cover any conceivable amount of money or gold dust which the traveler, after he has become a guest, might be disposed to thrust into the custody of his host, and thus compel him to become the insurer of its safety. It is a question which the jury should decide, whether the bundle was taken to the inn of the defendant by the plaintiff in his character of guest, in which event the defendant's liability would cover all losses, or whether, after the plaintiff became a guest with the defendant, it was deposited there in the nature of an ordinary bailment, in which case the defendant would be bound to exercise no more, at the farthest, than ordinary diligence, and would be answerable, certainly, for nothing more than ordinary neglect. 1 *Cal.* 230, 231.

SEC. 43. The rules of law which govern the liability of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the

legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other, is, or may be, attended with the same consequences; and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both respects is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules. 13 *Cal.* 424, 425.

Thus, when A contracts with a telegraph company to have his dispatch transmitted, authorizing his agent to secure a debt due him from a third party, by attachment, and this service is so negligently performed that other creditors of the common debtor obtain the first attachment, and exhaust the assets of the debtor—which would not have been the case had the telegraph company performed its contract within a reasonable time, the company is liable not only for the cost of the dispatch, but for the amount of A's claim, which constitute the natural and proximate damages resulting from the breach of contract. 13 *Cal.* 422.

SEC. 44. There is no difficulty either in estimating the damages or ascertaining the cause of them. The process of ascertainment is the same in this as in other cases of carriers. The breach of the contract entitles the plaintiff to nominal damages, if no real damages are shown. The question of real or special damages, is a question of fact, and this question is dependent upon certain considerations, which, probably, are better left to a jury under appropriate instructions, than decided by the court. For example, the plaintiff had a right to have his message sent according to contract. To ascertain the damages sustained by the breach of this contract these inquiries are pertinent: If the message had been sent, was the plaintiff's agent at the time in the place to which the message was to have been sent? and would he have received it? Next, would he have then taken out an attachment on the debt? At what time could he have done this? Could he have given security? Could he have procured attorneys to issue the writ? At what hour

could and would it have been put in the hands of the sheriff? Was property there of the debtor's subject to the writ?

SEC. 45. If a telegraphic dispatch had reached the agent, in due time, the agent would have been bound to act at once; it is to be presumed that he would have done so; at least, he can testify whether he would. If he had, the sheriff is to be presumed willing to do his duty; if he did not, he would be liable to the plaintiff, and thereby the plaintiff's debt would be secured. 13 *Cal.* 425.

SEC. 46. There is no greater difficulty in this case than in a large class of cases upon which courts have frequently adjudicated. Take the case of an attorney: A note is placed in his hands for collection; he fails to sue; other creditors sue on claims placed later in the hands of other attorneys; these last get judgments, and exhaust the property of the common debtor. Upon showing that the claim was just; that the attorney failed to sue; that other creditors sued and obtained judgment on suits commenced later than the time the attorney might and ought to have sued, the attorney is held liable. It is true that it might be argued that all the intermediate persons might or might not have neglected their duties; but it is not to be presumed. On the contrary, the presumption of law is that persons intrusted with specific duties will perform them; or if there is no presumption on the subject, the question whether they would, if the defendant had done his duty, becomes a question of proof for a jury or for the court. 13 *Cal.* 425, 426.

SEC. 47. If a man, on the eve of the expiration of a policy of insurance on his house, telegraphs to his agent to renew the policy immediately, the agent having the funds and the authority of the principal, and the telegraph company neglects to forward the message, and the house is burned a few days afterwards, the company cannot defend upon the ground that it could not be known whether the agent would have insured or not.

If A bargains for a telegraphic dispatch to his agent to protect a bill of exchange, the company cannot, if it neglects to send it, set up that the damages were too remote, for it could not be known whether the agent would have taken the bill to the notary, or the notary have protested, or given

the notice; or whether, if the notice were given, the indorser could have been compelled to pay. The contract, the fact of the bill being due, the agent in the place, the notary at hand, the apparent solvency of the indorser, would be enough to charge the company. At all events, the plaintiff would be allowed to prove that these things would have been done, by the testimony of those who know or have opportunities of knowing the facts, in order to make out his case against the company. 13 *Cal.* 426.

Liability of Common Carriers.

SEC. 48. A common carrier is not liable for the loss of goods intrusted to him for carriage where it is understood that he is to receive no compensation for the carriage, and where he has exercised ordinary diligence in taking care of them; in such case he is liable only as a bailee without hire. 1 *Cal.* 350.

SEC. 49. A, a merchant of Sacramento, was in the habit of having gold dust carried gratuitously on the steamer *New World*, from that place to San Francisco, the owners of the steamer refusing to carry it for hire, or to become liable, as common carriers, in case of loss. *Held:* where a quantity of gold dust, belonging to the plaintiff, was stolen from the steamer, without any negligence on the part of the master and officers, that the plaintiff could not recover its value. 1 *Cal.* 350.

SEC. 50. It is clearly the duty of a ferryman to provide suitable boats, and all the conveniences necessary to insure the safe transportation of persons and property. 22 *Cal.* 536.

SEC. 51. A ferryman who takes charge of a team driven upon his boat, and directs an attempt to cross the stream, is liable as a common carrier for any loss that ensues in consequence of his negligence in the outfit or management of his boat, notwithstanding that the team was driven upon it at the time of peculiar danger and contrary to his express order. 22 *Cal.* 534.

SEC. 52. As soon as the ferryman signifies his assent or readiness to receive the passenger, he becomes liable for his safe transit and delivery, and is chargeable with any acci-

dent occurring, except by act of God or the public enemy. 5 *Cal.* 364.

SEC. 53. It is the duty of the ferryman to see that the teams are safely driven on board of the boat. If the ferryman thinks proper, he may drive himself, or may unharness the team, or unload the wagon for the purpose of getting them safely on board. But if he permits the party to drive himself he constitutes him, *quoad hoc*, his agent, and is responsible for all accidents. There can be no reason why this rule should not apply to the delivery as well as to the receipt of goods or passengers. 5 *Cal.* 364.

A ferryman undertakes to safely transport passengers or freight from and to certain points, and from the moment that he receives until he has delivered his freight in a proper and safe manner, he will be liable. It is his duty to provide suitable boats and all the conveniences necessary for transportation. 5 *Cal.* 364.

SEC. 54. The liability of a railroad company, as common carriers, differs from their liability as warehousemen. 23 *Cal.* 268.

SEC. 55. As common carriers, they are bound to safely transport and deliver goods to the point of their destination, unless the same are lost by the act of God or the public enemy, and the burden of proving that they are thus lost rests upon the company. 23 *Cal.* 268.

SEC. 56. When the goods arrive at the point of destination and are placed in the warehouse of the company, its liability as warehousemen commences, and from that time it is bound only to use ordinary care and diligence in safely keeping and delivering the goods; and the burden of proof in case of loss is on the bailor. 23 *Cal.* 268, 269.

SEC. 57. In an action against a railroad company for loss of goods as common carriers, where the proofs render it uncertain whether the goods are lost while being transported or after being deposited in the warehouse, and there is no proof of want of ordinary care, the judgment will be reversed. 23 *Cal.* 269.

SEC. 58. Proprietors of stage-coaches are common carriers, and common carriers are insurers or warrantors (with two or three exceptions) of the goods they undertake to

carry; but the difference in the character of the subjects of the conveyance, between men and things, creates a difference in the rule applying to them respectively. 13 *Cal.* 602.

SEC. 59. Carriers of passengers merely for hire, are subject to the same responsibility as carriers of goods for hire, at the common law, so far as respects the baggage of the passengers. But, as to the persons of the passengers, a different rule prevails. Attempts have been made to extend their responsibility as to the persons of passengers, to all losses and injuries, except those arising from the act of God, or from the public enemies. But the support of this doctrine has been uniformly resisted by the courts, although a strict responsibility as to the carriage of the persons of passengers is imposed upon such passenger. 13 *Cal.* 602.

They are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings, and equipments, and to make a proper examination thereof previous to each journey. In other terms, they are bound to provide road-worthy vehicles, suitable for the safe transportation of the passengers. If they fail in any of these particulars, and any damage or injury occurs to the passengers, they will be responsible to the full extent thereof. Hence, it has been held, that if there is any defect in the original construction of a stage-coach, as for example, in an axletree, although the defect be out of sight, and not discernable upon a mere ordinary examination, yet, if the defect might be discovered by a more minute examination, and any damage is occasioned thereby, the coach proprietors are answerable therefor. The same rule will apply to any other latent defect, which might be discovered by more minute examination and more exact diligence, whereby the work is not road-worthy, and a damage thereby occurs to any passenger. In this respect there does not seem to be any difference between the case of a coach which is not road-worthy, and of a ship which is not sea-worthy, as to the implied obligation of the owner. 13 *Cal.* 602, 603.

SEC. 60. In the next place, they are bound to provide careful drivers, of reasonable skill and good habits, for

the journey, and to employ horses which are steady, and not vicious, or likely to endanger the safety of the passengers. The coachman must have competent skill, he must be well acquainted with the road he undertakes to drive, he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also lights by night. If there is the least failure in any of these things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that happens. 13 *Cal.* 603.

SEC. 61. In the next place, they are bound not to overroad the coach, either with passengers or luggage, and they are to take care that the weight is suitably adjusted, so that the coach is not top-heavy, and made liable to overset. 13 *Cal.* 603.

SEC. 62. The liabilities of such carriers naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries, except by the act of God, or by public enemies, the inquiry is naturally presented what is the nature and extent of their responsibility? It is certain that their undertaking is not an undertaking absolutely to convey safely. But although they do not warrant the safety of the passengers, at all events, yet their undertaking and liability go to the extent that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. But in what manner are we to measure this due care and diligence? Is it ordinary care and diligence which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence, which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose lives, and limbs, and health, are of great importance, as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem to furnish the true analogy and rule. It has been accordingly held that passenger carriers bind themselves to carry safely those whom they admit into their coaches, as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons;

and of course they are responsible for any even the slightest neglect. 13 *Cal.* 604.

SEC. 63. When injury or damage happens to the passengers, by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption *prima facie* is, that it occurred by the negligence of the coachman; and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and limb, hold the proprietors (604) liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof. 13 *Cal.* 604, 605.

SEC. 64. While it is true that the proprietors of a stage coach do not warrant the safety of passengers in the same sense that they warrant the safe carriage of goods, yet they do warrant that so far as to covenant for the exercise of extraordinary diligence and care to insure it; and they do this as common carriers. 13 *Cal.* 605.

SEC. 65. In an action against a common carrier for negligence, evidence of a rule qualifying his duties under peculiar circumstances is inadmissible without first showing that the rule was known to the plaintiff either directly or constructively. 22 *Cal.* 534.

SEC. 66. The degree of care and diligence which a carrier is bound to bestow upon property intrusted to him for transportation, depends upon its value and quality. Thus he will be required to exercise greater care and diligence in the preservation and safe delivery of a box of coin than a keg of nails, and of glassware than of bar iron. The value of the article especially is an important ingredient in considering the question of negligence; for that will be gross negligence in the case of a parcel of great value, which would not be in the case of a common article of little value. The general rule in the case of carriers is that they are bound to use ordinary diligence, and are liable for ordinary neglect; that is, they must take such care of the prop-

erty intrusted to them as every prudent and intelligent man commonly takes of his own goods.

When the carrier is unable to ascertain the value of the goods intrusted to his care, from the appearance of the package, a question has arisen whether he must inquire its value, or whether the person employing him must inform him of the value, when it is of some great or peculiar value, which is not disclosed by the appearance of the package itself. The carrier has no right to open a (189) letter or package intrusted to him for transportation, in order to inform himself of the quality or value of its contents. How, then, is he to obtain the necessary information to enable him to exercise that care and diligence which the law requires of him—which depends to a great extent upon the article itself? It is the duty of every person sending goods to make use of no fraud or artifice to deceive or mislead the carrier, so as to increase the risk, or to lessen his care and diligence. If any fraud or unfair concealment is used, the carrier will not be responsible for any loss, and it will make the contract between them null and void. This rule applies to all cases of concealment or suppression of facts, and to all false statements made by the employer for the purpose of misleading the carrier.

Still, the general rule has been held to be that the employer is under no obligation to inform the carrier of the value of the property; and the mere fact that he does not do so, in the absence of any attempt or act to mislead or deceive him as to the value, will not as a general rule, affect the legal liability and responsibility of the carrier. But it is also held, as a general rule, that the carrier has a right to inquire as to the value and character of the property, and to have a correct answer. If he is deceived in any way, or a false answer is given, in such case he will not be responsible for any loss. It has also been held, as a general rule, that if he makes no inquiry, and no artifice is made use of to mislead him, then he is responsible for any loss, however great the value may be.

These rules were adopted in cases where the articles transported were goods of the kind ordinarily transported by carriers, before the more modern changes in the modes

of doing mercantile business. But recently a new kind of business has grown up in connection with the carriage of goods, and that is, the transmission of letters put up in sealed envelopes. It is an important question whether this rule, making it the duty of the carrier to inquire as to the value, properly applies to the express business. There are some good reasons for the rule in the case of ordinary packages of goods, which are from necessity received personally by the carrier or his servants. But those reasons do not apply to the receipt and transmission of letters. The greater portion of such letters are received by the letter-carriers in boxes, and it is only a very small portion of the letters that are ever received by the carriers or their employees in person. This plan of doing business has become necessary. It would be almost an impossibility for the carrier to make the inquiry as to the value of the contents of each letter received. The law does not require impossibilities, or attempt to deprive the public of the means necessary for the convenient, safe and speedy, transmission of their letters. On the contrary, it will adapt its rules to the new and varying systems of business, so that justice may be done to all parties. Where the reason ceases the rule ceases. This rule should be so far modified as to except letters from its application, and relieve the carriers from the necessity of making the inquiry of the value of the contents of the letters received by him, making it the duty of the person employing the carrier to inform him of such value, in all cases where he desires to hold the latter responsible for any loss beyond that of an ordinary letter not containing articles or papers of special value. By means of the notice, the carrier will be required to use such kind of care and diligence as the law demands in cases of that kind, where articles of value are placed in his charge.

It is a general rule in the law of bailments, that if the plaintiff has brought the injury on himself, or has been guilty of negligence, and that negligence in any way concurred in causing the loss or damage, he is not entitled to recover. This rule is most frequently applied to cases of damage occasioned by obstructions in a highway, to colli-

sions between carriages upon land and vessels upon water. It also applies to common carriers, who are not held responsible for damages caused by the neglect of their employer. It also applies to innkeepers. 23 *Cal.* 188–192.

SEC. 67. In the case of railroads which are permanently established by law as a mode of conveyance, the conductors are only required to use the ordinary care pertaining to that description of business. But where the streets of a city, forming as usual, thronged thoroughfares, are diverted from their ordinary and legitimate uses, by special license to a private person, for his own benefit, and for the pursuit of a business which involves constant risk and danger, no other rule is consistent with the safety and protection of the community, than that which demands extraordinary care. 3 *Cal.* 243.

SEC. 68. The general rule of law is, that common carriers must take care at their peril, that goods placed in their charge for transportation are delivered to the right person; for otherwise they will become responsible. But the question as to what will constitute a delivery by which the responsibility of the carrier will cease, depends upon a variety of circumstances—such as the custom of particular places, the usage of particular trades, the manner of transacting business by different classes of carriers, their different means of transportation, and often upon special or implied contracts between the parties. Any local or special custom or usage upon the subject will govern as an implied term in the contract between the parties. Thus, while a carrier by the ordinary means of land conveyance will be required to deliver goods transported by him to the person entitled thereto, either at his place of business or residence, a carrier whose means of conveyance is by water will only, as a general rule, be required to deliver property at the proper wharf or landing; or if a railroad, at the proper depot. Where the mode in which the carrier transacts his business, however, makes it his duty to deliver letters and packages to the owner at his place of business or residence, according to the character of the articles, this delivery must be either to the party to whom the letter or package is addressed in person, or to some agent, clerk or employee,

authorized by him to receive the same. This will often depend upon the established mode or custom of doing business between the carrier and his customers. 23 *Cal.* 188, 189.

SEC. 69. If one destroys a chattel wantonly, this is a wrongful intent expressed. In the case of a common carrier, who delivers goods by mistake to the wrong person, this is a wrongful intent implied, because his undertaking was absolute to deliver to the right owner. 2 *Cal.* 573.

SEC. 70. The delivery of goods by a carrier to an agent of the owner, is of course a sufficient delivery, but the defense in such case must clearly show that the person to whom the goods were delivered, as agent, was duly authorized as such; for if he delivers to any but the owner he does so at his peril. And although the delivery to a wrong person is made by mistake, or by gross imposition, the carrier will be responsible for the value of the goods. 2 *Cal.* 418.

SEC. 71. Authority to deliver goods, confers no authority to take them back, or to countenance the shipment. 2 *Cal.* 418.

SEC. 72. In suits against common carriers, there is no reason why compensation should not be given for pain of mind as well as body. 13 *Cal.* 601.

SEC. 73. In an action against a common carrier, to recover damages for the loss of a draft, the measure of damages, *prima facie*, is the amount due on the same : but the defendant is at liberty to reduce the damages by proof of payment, the insolvency of the maker, or any fact tending to invalidate the security. 23 *Cal.* 179.

CHAPTER X.

CONTRACTS OF CORPORATIONS.

SECTION 1. A corporation is an artificial person, (5 *Cal.* 307), and shall have such powers, rights and privileges, as may be conferred on it by statute. In this state it shall have the right:

1st. Of succession by its corporate name for the period limited, and when no period is limited, perpetual.

2d. To sue and be sued in any court.

3d. To make and use a common seal, and alter the same at pleasure.

4th. To hold, purchase and convey, such real and personal estate, as the purposes of the corporation shall require, not exceeding the amount limited by law.

5th. To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.

6th. To make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs and for the transfer of its stock. *Gen. Laws*, 746.

SEC. 2. The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural persons. 4 *Cal.* 306.

SEC. 3. The supervisors of a county are a *quasi* political corporation. 6 *Cal.* 681.

SEC. 4. The power to sue is an inseparable incident to a sole corporation. 1 *Cal.* 94.

SEC. 5. A corporation can only act in the manner prescribed by law. 7 *Cal.* 375.

SEC. 6. Corporations have no power except such as are specifically granted, and must be held strictly within the limits of their granted powers. 5 *Cal.* 242.

SEC. 7. Corporations must pursue strictly the authority conferred by their charters, and can exercise no powers, unless conferred, or necessary to the complete execution of such powers. 4 *Cal.* 9, 10.

SEC. 8. When a corporation relies upon a grant of power from the legislature for authority to do an act, it is as much restricted to the mode prescribed by the statute for its exercise as to the thing allowed to be done. If the charter confers upon the corporation a given power, and at the same time prescribes the *mode* of its exercise, the provisions must be held as dependent, and must be construed accordingly. 7 *Cal.* 375.

SEC. 9. Stockholders continue liable for "all debts con-

tracted during the time that they were stockholders." 6 *Cal.* 81.

SEC. 10. Corporations, like individuals, have the power to contract, but their contracts must, in general, be under their corporate seal, and such seal must be affixed with intent to render the instrument effectual, although no formal delivery thereof is necessary. 5 *East*, 239.

SEC. 11. For general purposes, not affecting the interest or title of the corporation, a corporation may act through the medium of an agent, although he possesses no authority under seal. 2 *Camp.* 96.

SEC. 12. It is said, by Chancellor Kent: "That it is a doctrine generally established in the courts of the several states, with great clearness and solidity of argument, that corporations cannot be bound by contracts made by themselves or their agents, though not under seal, and also on implied contracts, to be deduced by inference from corporate acts, without either a note, or deed, or writing." See the numerous cases cited in support of this doctrine. 1 *Pick.* 297; 7 *Greenl.* 178.

SEC. 13. In this state, each member of an incorporated company is answerable, personally, for his proportion of the debts and liabilities of the company. 14 *Cal.* 265.

Each corporator is a principal debtor, and not a mere surety for the corporation, and, in relation to the creditors of the corporation, stands on the same footing as if it were an ordinary partnership. 14 *Cal.* 265.

SEC. 14. Section seventeen of the corporation act of 1853, was intended to apply only to the trustee of an express trust. 15 *Cal.* 320.

SEC. 15. The third section of the act of 1850, concerning corporations, prohibits them from issuing bills, notes, or other evidences of debt, upon loans, or for circulation as money. The act contemplates that corporations will incur debt, and limits their power to incur debts to the amount of the capital stock paid in: *Held*, that corporations are not prohibited from borrowing money and issuing the usual evidence of debt therefor. 5 *Cal.* 258.

SEC. 16. Section one hundred and twenty-two of the act provides, as we have seen, for the filing of a certificate with

the clerk, and a duplicate with the secretary of state: but section one hundred and twenty-three declares that when the *certificate* shall be filed, the persons executing the same and their successors, shall be a body politic and corporate. The intention of the legislature could not have been more clearly expressed. So far as individuals are concerned, it was intended that the corporation should acquire a valid legal existence upon the filing of the certificate. The filing of the duplicate is exclusively a matter between the corporation and the state. The rights and privileges conferred by the statute vest in the corporation upon the filing of the certificate, and can be divested only by a direct proceeding for that purpose. If the duplicate has not been filed, the assumption of corporate powers amounts simply to a usurpation of the sovereign rights of the state, the remedy for which rests with the state alone. 14 *Cal.* 427.

CHAPTER XI.

DEBT, CONTRACTS OF.

SECTION 1. Debt comprehends all agreements either express or implied, by which one party becomes bound to pay to another a sum of money, either fixed by the terms of the contract, or capable of being determined by other evidence. In all such cases an action can be brought to recover the amount actually due to plaintiff. *Cow. Treatise*, Sec. 108.

SEC. 2. In all contracts, the evidence of which is in writing, the obligations of the parties are to be determined by a proper *interpretation* of the writing. The language used is always supposed to convey the meaning intended, and is the best evidence of that intention. The following are some of the rules of interpretation:

1st. The intention of the parties where it is manifest from the instrument shall prevail, unless it is contrary to some rule of law.

2d. When the intention is manifest, mere inaccuracies in

language, or mistake, will be disregarded. These defects will be supplied by the court.

3d. When, by the language of the contract, persons or property are described or referred to by description, which may be applied to other persons or property, other evidence can be received to render certain that which was intended. As, when A sells to B the wheat raised on his Salem farm, and it afterwards appears that A had two farms by that name, extrinsic evidence may be admitted to show which farm by that name was meant.

4th. Words employed in a written instrument are to be understood in their ordinary sense. If they are technical terms, pertaining to a particular trade or profession, extrinsic evidence may be received to explain those terms. 1 *Story on Cont.* Sec. 233.

SEC. 3. When the obligations of the parties are determined by the interpretation of the record or instrument, the failure of one party to perform them, for which a suit is brought to recover damages resulting from such failure, unless the contract particularly provides for the amount of damages to be given the injured party, they must be ascertained from evidence, to be admitted, subject to certain rules, which will hereafter be noticed. *Cow. Treatise*, Sec. 110.

SEC. 4. Contracts upon which actions can be brought for the recovery of money only, in addition to those mentioned in the preceding sections, include every description of agreements, by which one party has undertaken to do or not to do a particular thing, or that another shall do or not do a particular thing, or that a particular fact is or is not so. *Cow. Treatise*, Sec. 111.

SEC. 5. A slight consideration is sufficient to sustain a contract, so it be a benefit to the defendant or a loss to the plaintiff, it is sufficient. 3 *Johns.* 104.

SEC. 6. Mutual promises made at the same time furnish good considerations for each other, unless the promise on one side is void—as a promise to do an unlawful act. But if the promise of one party be voidable only as the promise of an infant to marry, the consideration is sufficient. The infant may maintain an action for its breach, although his

infancy would be a defense in an action by the adult. 1 *Story on Cont.* 139.

SEC. 7. A moral obligation, not founded on a previous legal or equitable obligation, is not sufficient consideration; as, where I have a judgment against one, and he delivers to me a pledge to secure it, and I sell the pledge upon execution, promising to pay what it sells for beyond satisfying the judgment, the consideration is a good one for the promise. *Cow. Treatise*, Sec. 115.

SEC. 8. A command or request made by one to another to do an act which is a trespass, is a sufficient consideration for an *express* promise to indemnify, whether made before or after the commission of the act. But the law will not *imply* a promise in such cases. 2 *Kent's Com.* 465.

SEC. 9. A promise by the holder of a note to extend the time of payment, if without some new consideration, is void. But if the maker furnished additional security for the debt, or if he took up an old note and gave a new one in consideration of said extension time, it is sufficient. 1 *Wend.* 317.

SEC. 10. A promise to pay damages for the detention of a sum of money beyond the sum detained, is void. 2 *Hall's Rep.* 185.

SEC. 11. Where one buys goods for money, which is not paid, and neither earnest money given nor a delivery, no action lies for the money or goods. So, where I give you the refusal of goods for a certain price for a certain time, and you give me notice within the time that you will take them, this does not bind me, for you not being bound to accept the offer, there was no consideration for my promise. So, where one agrees gratuitously to build a house for another, and neglects it, no action lies, even though special damage ensued; it would, however, be otherwise if he had entered upon the work. 4 *Johns.* 84.

SEC. 12. A promise to permit one to pass over my land is a mere license, and will not prevent my withdrawing the license and fencing up the passage. 10 *Johns.* 246.

SEC. 13. Where the consideration be wholly executed before the promise is made, it is not sufficient, unless it arose at the *request* of the party making it. And the request

must have been *expressly* made or be necessarily implied from the circumstances. For the rule is, that I shall not, without a request, do you a kindness and afterwards charge you for it, even though you then promised to pay for it. As if I, without your knowledge, save your property from fire, and you afterwards promise to pay me for my trouble. But where the circumstances under which the service is performed show a strong moral obligation to make the request, a request is implied. As where one, without cause, expels his wife and child from his house, and another furnishes her necessaries; where one pays another's debts and he promises to pay him; where, during the absence of A, his wife or child dies, and B buries her, and A promises to pay for the services a certain sum. In these and similar cases, the jury may infer a request, in order to support an express promise, and where the services which form the consideration was performed at the request of the party, the circumstance that the promise was subsequently made does not affect it. As, where I perform a service at your request, and you afterwards promise to pay me one hundred dollars for it, the promise is good and you cannot show that the amount to be paid was more than the service was worth, without showing that I used some fraudulent means to extort it. *Rol. Abr.* 11.

SEC. 14. A consideration partly executed at the time of the promise and completed afterwards, will not support it, though it be begun and completed without the request of the party promising. Such are called *continuing considerations*. As, where one married the maid who lived in the plaintiff's house, and about the middle of the year promised him that if she remained for the year he would pay for her board for the whole year past, as well as future. *Bac. Ab.* Assumpsit D.

SEC. 15. The consideration may come from a third party. As where, in consideration that you will contract with A to deliver him a horse, I pay you the price. And where one person makes a promise to another for the benefit of a third, the third person may maintain an action upon it. You owe me, and sell an article to A, he promising you that he will pay me the price; here I may recover against A upon the

promise, for although the promise was made to you it was for my benefit, and the consideration was a good one. *Cow. Treatise*, Sec. 125.

CHAPTER XII.

CONTRACTS OF FREIGHT.

SECTION 1. Delivery of goods by the master and payment of freight by the owner, are concurrent contracts, and neither party is bound to perform his part of the shipping contract, unless the other is ready to perform the correlative act. *Frothingham* vs. *Jenkins*, 1 Cal. 42.

SEC. 2. Contracts for carrying freight form no exception to the general rule of law, that when money is paid by one party in consideration of an act to be done by another, and the act is not done, the money so paid may be recovered back. 6 *Cal.* 29.

SEC. 3. If freight is paid in advance on a charter party, and the voyage is not accomplished by reason of the loss of the vessel at sea, the freight advanced may be recovered. 6 *Cal.* 29.

SEC. 4. The general rule is, that freight is lost unless the goods are carried to the port of destination. The rule goes further, and obliges the master, in case of shipwreck, to restore to the shipper the freight previously advanced. *Reina* vs. *Cross*, 6 Cal. 31.

Freight is a compensation for the carriage of goods, and if paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it then forms the ordinary case of money paid upon a consideration which happens to fail, and is to be repaid, unless there be a special agreement to the contrary. 6 *Cal.* 31.

SEC. 5. In an action for freight due on a charter party, brought in the courts of this state, it is not a sufficient answer to set up that the vessel has been libeled for the non-delivery of freight, in the district court of the United States, both actions may be proved at the same time without the fear or danger of any collision or clashing of jurisdiction. *Russell* vs. *Alveres*, 5 Cal. 48, 49.

SEC. 6. Advance freight can be recovered back by the charterer, in case of the loss of the ship or non-performance of the voyage whether by the fault of the master or not. *Lawson* vs. *Worms*, 6 Cal. 365.

SEC. 7. *Shipping Masters.*—A, a merchant in Boston, shipped, by *one* bill of lading, certain merchandise to San Francisco, consigned to B, who was the mere agent of A, the owner. On arrival, part of the merchandise was delivered, and part of the freight paid; but the agent being unable to raise funds to pay the whole freight, offered to give good security for the payment thereof, in case the master would make the delivery, which offer the master refused to accept: *Held*, that the master had a lien on all the goods mentioned in the same bill of lading for the entire freight; that part delivery was no waiver of his lien on the remainder of the goods for the unpaid balance of freight, and that an offer to give good security for payment of the freight could not divest the master's lien, nor was such offer sufficient to compel the master to deliver the remainder of the goods. *Frothingham* vs. *Jenkins*, 1 Cal. 42.

SEC. 8. *Cargo for Freight.*—Where it appears clearly from a charter party, that the intention of the owner of the ship and the charterer is, that the former shall have no lien on the freight, but shall give a personal credit to the charterer, the former loses his right of lien on the cargo, and can look only to the personal responsibility of the charterer for the payment of the hire of the vessel. *Brown* vs. *Howard & Howard*, 1 Cal. 423.

CHAPTER XIII.

HUSBAND AND WIFE.

SECTION 1. Marriage is considered, in law, as a civil contract, to which the consent of the parties is essential. *Gen. Laws*, 4460.

SEC. 2. Marriage is regarded as a civil contract, and no form is necessary for its solemnization. If it takes place between parties able to contract, an open avowal of the in-

tention and an assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding. *Graham* vs. *Bennett*, 2 Cal. 506.

SEC. 3. Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage. These facts are only *prima facie* evidence of marriage. *Litters* vs. *Cady*, 10 Cal. 537.

SEC. 4. All marriages between parents and children, including grandparents and grandchildren of every degree; between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews, are declared to be incestuous, and absolutely void. This section shall extend to illegitimate as well as to legitimate children and relations. All marriages of white persons with negroes or mulattoes, are declared to be illegal and void. Whoever shall contract marriage, in fact, contrary to the prohibitions in this section, and whoever shall solemnize any such marriage, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by fine or imprisonment, or both, at the discretion of the jury which shall try the cause; or, if the conviction be by confession, at the discretion of the court; the fine to be not less than one hundred nor more than ten thousand dollars, and the imprisonment to be not less than three months nor more than ten years. All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places within this state. *Gen. Laws*, 4461–4464.

SEC. 5. Every judge and justice of the peace, and every clergyman of any denomination, or licensed preacher of the gospel, may perform the ceremony of marriage in this state. *Gen. Laws*, 4465.

SEC. 6. No person shall be joined in marriage unless such person shall have first obtained a license therefor from the clerk of the county court of the county in which the marriage is to be celebrated, which license shall authorize any judge, justice of the peace, clergyman or preacher of the gospel, to celebrate and certify such marriage; but no such license shall be granted for the marriage of any male under twenty-one years of age, or for any female under the age of eighteen

years, without the consent of his or her father, or if he be dead or incapable, of his or her mother or guardian, to be noted in such license, or unless the party or parties under said ages, respectively, shall have been previously married; and if any clerk shall issue a license for the marriage of any such minor, without consent as aforesaid, he shall forfeit and pay a sum not less than one hundred dollars, nor more than one thousand dollars, to the use of such father, mother or guardian, to be sued for and recovered in any court having cognizance thereof; and for the purpose of ascertaining the age of the parties, such clerk is hereby authorized to examine either party or other witnesses, on oath; and the clerk shall be entitled to receive for such certificate the sum of two dollars, one-half of which he shall pay to the recorder of the county for recording the license and certificate, except in counties where the clerk and recorder receive salaries, then he shall pay the two dollars into the county treasury: *provided*, unmarried persons living and cohabiting together as husband and wife, may be married without license or public record thereof: *provided*, the clergyman performing the ceremony shall make a record thereof in the church register. *Gen. Laws*, 4466.

SEC. 7. Any judge, justice of the peace, clergyman, or preacher of the gospel, who shall celebrate any marriage, shall make a certificate of such marriage, and file the same, together with the license therefor, within thirty days thereafter, in the office of the county recorder in and for the county in which said marriage was celebrated; and any person neglecting or refusing to make such return within the above required time, shall forfeit for each and every such offense, a sum not exceeding fifty dollars, to be recovered on indictment, and paid into the common school fund of said county; and if any judge, justice of the peace, clergyman or preacher of the gospel, shall solemnize and join in marriage any couple without a license, as aforesaid, shall, for every such offense, forfeit and pay a sum not exceeding five hundred dollars, to be recovered on indictment, and to be paid into the common school fund of the county. *Gen. Laws*, 4467.

SEC. 8. The recorder shall record all such certificates of

marriage, together with the license, in a book to be kept for that purpose, within one month after receiving the same, and he shall be allowed to receive for each such record, to include both certificate and license, the sum of one dollar. The books of marriages to be kept by the respective recorders, and copies of entries therein, certified by him under his official seal, shall be evidence in all courts. If any person authorized to solemnize any marriage, shall willfully make a false return of any marriage or pretended marriage, to the recorder, or if the recorder shall willfully make a false record of any return of a marriage, he shall be deemed guilty of a misdemeanor, and shall be punished by fine not less than one hundred nor more than ten thousand dollars, and by imprisonment of not less than three months nor more than ten years. *Gen. Laws*, 4468–4470.

SEC. 9. A married woman follows the domicile of her husband, because, being under his authority, she has no right to choose one for herself. *Kashaw* vs. *Kashaw et al.*, 3 Cal. 322.

SEC. 10. The desertion of the husband entitles the wife to her own domicile. *Moffat* vs. *Moffat*, 5 Cal. 281.

SEC. 11. All property, both real and personal of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards, by gift, bequest, devise, or descent, shall be his separate property. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property. *Gen. Laws*, 3563, 3564.

SEC. 12. The presumption attending the acquisition of property during marriage, by either husband or wife, is that the property belongs to the community. *Burton* vs. *Lies et al.*, 21 Cal. 87.

SEC. 13. A full and complete inventory of the separate property of the wife shall be made out and signed by the wife, acknowledged or proved in the manner required by law for the acknowledgment or proof of a conveyance of land, and recorded in the office of the recorder of the

county in which the parties reside. If there be included in the inventory any real estate lying in other counties, the inventory shall also be recorded in such counties. The filing of the inventory in the recorder's office shall be notice of the title of the wife, and all property belonging to her included in the inventory, shall be exempt from seizure or execution for the debts of her husband. *Gen. Laws*, 3565–3567.

SEC. 14. The capacity of the wife to hold separate property is created by the constitution, and her title to her separate estate depends *alone* upon the mode of its *acquisition*, and vests in her before the inventory can be filed. The legislature intended to make the filing of the inventory of the wife's separate property *notice*, not of the wife's intention to continue to assert her right, but of the claim itself; in other words, it was intended to give notice of what property the wife claimed to have owned before marriage, or acquired afterwards, by gift, bequest or devise. *Selover* vs. *American Russ. Com. Company*, 7 Cal. 272.

SEC. 15. The husband shall have the management and control of the separate property of the wife during the continuance of the marriage; but no alienation, sale or conveyance, of the real property of the wife, or any part thereof, or any right, title or interest, therein, and no contract or power of attorney, concerning or relating to the same, and no lien or incumbrance created thereon, shall be valid for any purpose, unless the same be made by an instrument in writing, executed by the husband and wife, and acknowledged by her, as provided for in the acts concerning conveyances, in case of the conveyance of her separate real estate. The personal property of the wife shall not be sold, assigned or transferred, unless both husband and wife join in the sale, assignment or transfer, thereof, except property which she is or may be authorized by law to sell, assign or transfer, as a *femme-sole*. *Gen. Laws*, 3568.

SEC. 16. The statute, it is true, provides that a married woman cannot make any sale or other alienation of her separate property, except by an instrument in writing. (Act defining the rights of husband and wife, Sec. 6.) But in this provision the statute has reference to property other

than money. It does not contemplate that every time a married woman pays her money for articles purchased, she must execute an instrument in writing in order to make a valid transfer of the money. In the present case, the money was in the hands of the defendant, and the plaintiff could as well consent by parol to its retention by him, as she could have paid it to him without writing, if it had been at the time in her possession. *Coles* vs. *Soulsby*, 21 Cal. 51.

SEC. 17. When a husband abandons his wife, leaving her to her labor for a support, and she obtains such articles as those sued for here [furniture] by her own contracts and earnings, we think the husband must be held to assent to her disposition of them, if her necessities or convenience require it. He permits her to act as *femme-sole* in acquiring such property, and he ought not to dispute her acts in that character when she disposes of it. The fair presumption is that he consents to her acting in this way—as otherwise she would not be enabled to support herself at all. *Lawrence* vs. *Spear*, 17 Cal. 423, 424.

SEC. 18. A married woman may, no doubt, execute a power of authority without her husband. But if she be a trustee for infants, she cannot dispose of the trust property, except by the order of the proper court. The infants cannot give a binding consent, and the court is bound to protect their rights. *Kendall* vs. *Miller*, 9 Cal. 592, 593.

SEC. 19. Under our statute, the sale of the separate property of the wife, whether real or personal, must be in writing, signed and acknowledged in the manner pointed out by the statute, or it is void. *Selover* vs. *Am. Russ. C. Co.*, 7 Cal. 247. Where a *femme-sole* becomes the owner of shares of stock in a company, and afterwards marries, and after marriage the husband and wife execute an indorsement on the certificate of stock, purporting to sell the same to A, without any privy examination of the wife, and there being at the time no inventory of the separate property of the wife on record: *Held*, that such sale was void, as against a subsequent purchaser, under an instrument duly signed and acknowledged. *Selover* vs. *American Russ. Com. Company*, 7 Cal. 266.

SEC. 20. The doctrine of estoppel *in pais* has no applica-

tion to the estates of married women; for the act of 1850 is enabling, the estate vesting only after compliance with the mode of conveyance prescribed by the statute. Where the wife stands by and sees personal property sold by the husband as his own, she is not estopped from afterwards claiming it. The law has thrown certain guards around a married woman to protect her from the influence of her husband. It has provided a mode by which alone she can be deprived of her real estate, and to use no stronger language, it is certainly very doubtful whether she can be deprived of her separate personal estate in any other mode than the one prescribed by the instrument of settlement. The mere silence of the wife as to her title, and her failure to obtrude her rights upon the notice of others, cannot divest her of her property. The general rule is, that if the conveyance of the *femme-covert* be not executed according to the forms prescribed by the statute, it is not valid. *Morrison* vs. *Wilson and Wife*, 13 Cal. 497, 498.

SEC. 21. The doctrine that fraud vitiates all contracts, even those made by infants or *femmes*, is, in cases of married women, under statutes like ours, limited to this: that a contract so infected cannot be enforced; but not that a fraudulent representation will divest a *femme's* title in the face of a statute declaring a different and exclusive mode of divesture. *Morrison* vs. *Wilson and Wife*, 13 Cal. 498.

SEC. 22. When any sale shall be made by the wife of any of her separate property, for the benefit of her husband, or when he shall have used the proceeds of such sale with her consent in writing, it shall be deemed a gift, and neither she nor those claiming under her shall have any right to recover the same. If the wife has just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste, her separate property, she, or any other person in her behalf, may apply to the district court for the appointment of a trustee, to take charge of and manage her separate estate; such trustee may, for good cause shown, be from time to time removed by the court, and another appointed in his place. Before entering upon the discharge of his trust, he shall execute a bond, with sufficient surety or sureties, to be approved by the court, for the proper performance of his

duties. In case of the appointment of a trustee for the wife, he shall account for and pay over to the husband and wife, or either of them, the income and profits of the wife's estate, in such manner and proportion as the court may direct. The husband shall have the entire management and control of the common property, with the like absolute power of disposition, as of his own separate estate; and the rents and profits of the separate estate of either husband or wife shall be deemed common property; unless in the case of the separate property of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised or given, to her, that the rents and profits thereof shall be applied to her sole and separate use; in which case the entire management and disposal of the rents and profits of such property shall belong to the wife, and shall not be liable for the debts of the husband. *Gen. Laws*, 3569–3571.

SEC. 23. The husband, by the express language of the statute, is entitled to the management and control of the separate property of the wife during the continuance of the marriage, and, of course, to its possession. If the wife have any just cause to apprehend that her husband will mismanage or waste her separate property, she has her remedy by application to the district court, for the appointment of a trustee to take charge of and manage the same. *Mahone* vs. *Grimshaw*, 20 Cal. 176.

SEC. 24. No estate shall be allowed to the husband as tenant, by courtesy, upon the decease of his wife, nor any estate in dower be allotted to the wife upon the decease of her husband. Upon the dissolution of the community by the death of the wife, the entire common property shall, without administration, go to the surviving husband. Upon the dissolution of the community by the death of the husband, one-half of the common property shall go to the surviving wife, and the other half shall be subject to the testamentary disposition of the husband, and in absence of such disposition, shall go to his descendants, equally, if such descendants are in the same degree of kindred to the intestate, otherwise, according to the right of representation; and in the absence of both such disposition and such descendants,

shall be subject to distribution in the same manner as the separate property of the husband: *provided*, that in case of the dissolution of the community by the death of the husband, the entire common property shall be equally subject to his debts, the family allowance, and the charges and expense of administration. In case of the dissolution of the marriage by decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property or the sale and equal distribution of the proceeds thereof, as the nature of the case may require: *provided*, that when such decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof, shall only be entitled to such portion of the common property as the court granting the decree may in its discretion, from the facts of the case, deem just and allow, and such allowance shall be subject to revision on appeal in all respects, including the exercise of discretion by the court below. The separate property of the husband shall not be liable for the debts of the wife contracted before the marriage, but the separate property of the wife shall be and continue liable for all such debts. *Gen. Laws*, 3572–3575.

SEC. 25. The separate property of the wife and the common property of both husband and wife, are equally liable for the debts of the wife contracted previous to her marriage, and judgments recovered for such debts may be enforced against either class or both classes of property indiscriminately. *Van Maren* vs. *Johnson*, 15 Cal. 312, 313.

SEC. 26. In every marriage hereafter contracted in this state, the rights of husband and wife shall be governed by this act, unless there is a marriage contract containing stipulations contrary thereto. The rights of husband and wife, married in this state prior to the passage of this act, or married out of this state, who shall reside and acquire property herein, shall also be determined by the provisions of this act, with respect to such property as shall be hereafter acquired, unless so far as such provisions may be in conflict with the stipulations of any marriage contract. All marriage contracts shall be in writing, and executed and ac-

knowledged or proved, in like manner as a conveyance of land is required to be executed and acknowledged or proved. When a marriage contract shall be acknowledged or proved, it shall be recorded in the office of the recorder of the county in which the parties reside, and also in the office of the recorder of every county in which any real estate may be situated, which is conveyed or affected by such marriage contract. When any marriage contract is deposited in the recorder's office for record, it shall, as to all property affected thereby, in the county where the same is deposited, impart full notice to all persons of the contents thereof. No marriage contract shall be valid, or affect any property, except between the parties thereto, until it shall be deposited for record with the recorder of the county where the parties reside, and if it relates to real estate in other counties, with the recorder of the county wherein such property is situated. A minor, capable of contracting matrimony, may enter in a marriage contract, and the same shall be as valid as if he was of full age: *provided*, it be assented to, in writing, by the person or persons whose consent is necessary to his marriage. A marriage contract may be altered at any time before the celebration of the marriage, but not afterwards. The parties to any marriage contract shall enter into no agreement, the object of which shall be to alter the legal order of descent, either with respect to themselves in what concerns the inheritance of their children or posterity, or with respect to their children between themselves, nor derogate from the rights given by law to the husband, as to the head of the family, or to the surviving husband or wife, as the guardian of their children. No stipulation of any marriage contract shall be valid, which shall derogate from the rights given by law to the husband, over the persons of his wife and children, or which belong to the husband, as the head of the family, or to the surviving husband or wife, as the guardian of their children. *Gen. Laws*, 3575–3585.

SEC. 27. In the case of *Albert Packard, Adm'r of Josefa Arellanes, dec'd* vs. *Antonio Arellanes, and Ortega, Exr's of Teodora Arellanes* (17 Cal. 525), it was decided that "upon the death of the wife, the husband has the right to adminis-

ter the common property; that he has this right as survivor, and as such survivor may take possession of the common property and dispose of it, for the purpose of settling the community; that the wife's interest is not subject to administration under the laws for the settlement of the estates of deceased persons; that the interest of the wife, while living, in the common property is a mere expectancy, and after her death constitutes neither a legal nor an equitable estate; and that there is nothing for the probate court to act upon.

SEC. 28. Married women shall have the right to carry on and transact business under their own name, and on their own account, by complying with the regulations prescribed in this act. Any married woman, residing within this state, desirous to avail herself of the benefit of this act, shall give notice thereof, by advertising in some public newspaper of general circulation in the county in which she resides, for four successive weeks: *provided*, if any newspaper be published in said county, said publication shall be made in the paper so published in said county. Such notice shall set forth that it is her intention to make application to the district court of said county, on the day therein named, for an order of said court, permitting her to carry on business in her own name and on her own account, and it shall specifically set forth the nature of the business to be carried on. On the day named in the notice, or at such further time as the court may appoint, on filing proof of publication, the court shall proceed to examine the application, on oath, as to the reasons which induce her to make the application, and if it appear to the court that a proper case exists, it shall make an order, which shall be entered on the minutes, that the applicant be authorized and empowered to carry on, in her own name, and on her own account, the business, trade, profession or art, named in the notice; but the insolvency of the husband, apart from other causes tending to prevent his supporting his family, shall not be deemed to be sufficient cause for granting this application. Any creditor of the husband may oppose such application, and may show that it is made for the purpose of defrauding such creditor, and preventing him from collecting his debt, or will occasion such result; and if it shall so appear to the

court, the application shall be denied. On the hearing witnesses may be examined on behalf of either party. Before making the order, the court or judge shall administer to the applicant the following oath: "I, A, B, do, in presence of Almighty God, truly and solemnly swear, that this application is made in good faith, for the purpose of enabling me to support myself and my children (if the applicant have minor children), and not with any view to defraud, delay or hinder, any creditor or creditors of my husband; and that of the moneys so to be used in said business, not more than five hundred dollars has come, either directly or indirectly, from my husband: So help me, God." A certified copy of said order, with the said oath indorsed thereon, shall be recorded in the office of the recorder of the county where the business is to be carried on, in a book to be kept for such purpose. After the order has been duly made and recorded, as provided above, the person therein named shall be entitled to carry on such business, in her own name, and the property revenues, moneys and credits, so invested, shall belong exclusively to such married woman, and shall not be liable for any debts of her husband; and said married woman shall be allowed all the privileges, and be liable to all legal processes, now or hereafter provided by law against debtors and creditors, and may sue, and be sued, alone, without being joined with her husband. But nothing contained in this act shall be deemed to authorize a married woman to carry on business in her own name, when the same is managed or superintended by her husband. Any married woman availing herself of the benefit of this act, shall be responsible for the maintenance of her children. The husband of the wife availing herself of the benefit of this act, shall not be responsible for any debts contracted by her in the course of the said business, without the special consent of her husband, given in writing, nor shall his separate property be taken on execution for any debts contracted by her. All persons now doing business as sole traders, under the law of which this is amendatory, shall have six months from and after the first day of May, eighteen hundred and sixty-two, in which to give the notice and take the proceedings required by this act; and if

not done within that time, or if the application be denied by the court, the right to transact business as a sole trader shall no longer exist: *provided*, however, that all property rightfully acquired by such sole trader, previous to that time, shall be held by her as her separate property. *Gen. Laws*, 6915–6920.

SEC. 29. It shall be lawful for any married woman, by herself and in her name or in the name of any third person with his assent as her trustee, to cause to be insured for her sole use, the life of the husband, for any definite period, or for the term of his natural life; and in the event of her surviving her husband; the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her and for her own use, free from the claims of the representatives of the husband, or of any of his creditors, or of any parties claiming by, through or under, him. But when the premium or any part thereof paid in each year out of the funds and property of the husband, shall exceed five hundred dollars, such exemption from such claims shall not apply to so much of said insurance as shall be in proportion to said excess over five hundred dollars. In case of the death of the wife, before the decease of her husband, the amount of the insurance may be made payable, after her death, to her children, for their use, or, if under age, to their guardians.

SEC. 30. Any married woman may dispose of all her separate estate by will, absolutely, without the consent of her husband, either express or implied, and may alter or revoke the same in like manner, as a person under no disability may do; her said will to be attested, witnessed and proved, in like manner as all other wills.

SEC. 31. A married woman shall not be appointed administratrix, and if she shall, while unmarried, have received such appointment, her marriage shall extinguish her authority. *Pub. Laws*, 1866, p. 765.

SEC. 32. In criminal actions the husband is a competent witness against the wife, and the wife is a competent witness against the husband, but neither husband nor wife shall be compelled or allowed to testify in such cases unless by con-

sent of both of them: *provided*, that in all cases of personal violence upon either by the other, the injured party (husband or wife) shall be allowed to testify against the other. *Pub. Laws*, 1866, p. 46.

CHAPTER XIV.

CONTRACTS FOR MONEY HAD AND RECEIVED.

SECTION 1. The action for money had and received is an equitable action, and will lie whenever the defendant has received money belonging to the plaintiff, which, according to natural equity and justice, he ought to refund or pay over. It should not be extended, however, to cases in which the defendant may be deprived of any right, or subjected to any inconvenience thereby. *McCracken* vs. *City of San Francisco*, 16 Cal. 638.

SEC. 2. Money received by an administrator in payment for goods sold by his intestate as factor upon a *del credere* commission, forms no parts of the assets of the estate, and may be recovered by the consignor in an action for money had and received. 22 *Cal.* 516.

SEC. 3. In an action by the consignor for money had and received, the amount of goods sold on credit by the consignee who had no authority so to sell, can be recovered. Such sale must be taken in reference to the rights of the plaintiff, as having been for cash. To the defendant belongs the demand which the sale created against his vendee, and the defendant is liable to the plaintiff as for money had and received. *Johnson* vs. *Totten et al.*, 3 Cal. 347.

SEC. 4. F, while employed as boat captain by the defendant, a corporation, subscribed for its stock to the amount of two thousand dollars, and shortly afterwards advanced to the company, eight hundred and twenty dollars, upon a verbal condition that if he should be retained in his position as captain, the money should be applied as his stock subscription; but otherwise, should be considered a loan, and repaid. F was soon after discharged from the employment, and then assigned his demand to plaintiff: *Held*, that

plaintiff was entitled to recover of defendant the amount advanced as money had and received. *Allen* vs. *Citizens S. Nav. Co.*, 22 Cal. 28.

SEC. 5. The plaintiff had made certain advances of money, which defendants had received under the following circumstances: They were holders of a mortgage given to secure the payment of money advanced and to be advanced by themselves and others. The plaintiff made certain advances, and was one of the parties intended to be secured, but was no party to the mortgage. The defendants assigned the mortgage, and received the consideration, but refused to pay any portion of it to the plaintiff: *Held*, that the defendants occupied towards the plaintiff the position of trustees, and the money sued for was received by them, in that character. It is of no consequence that the trust was created by a contract to which the plaintiff was not a party. He subsequently assented to it, and the defendants cannot now repudiate it, and retain the money, which they would not otherwise have received, and they are liable to an action for money had and received. *Kreutz* vs. *Livingston et al.*, 15 Cal. 346.

SEC. 6. Where one, having a claim to collect, agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs and expenses to be shared *pro rata*, and, afterwards, prosecuted both claims to judgment in his own name, and in his own name bought the property of the defendant in executive sale and left it with an agent for sale, he is not liable to an action for money had and received, or in *indebitatus assumpsit*. If the defendant had undertaken this agency, he would be bound, though it were gratuitously undertaken, to good faith and ordinary diligence in executing what he pretended to do; but he could not be sued for money received if he never received any, though he failed to get it because of his gross negligence or even bad faith. If, in other words, he neither directly nor indirectly received money on account of this agency, though he might be responsible, in a different form of action, for his negligence, he would not be held responsible for money had and received, or in the form of *indebitatus assumpsit*. *Herrick* vs. *Hodges*, 13 Cal. 431.

SEC. 7. Under the act of 1857, regulating fees of office in certain counties, the sheriff may charge fees for copies of the summons and injunction served by him in a suit, though the copies were prepared and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid the sheriff. *Edmondson* vs. *Mason*, 16 Cal. 388.

CHAPTER XV.

PARTNERSHIP.

	SECS.		SECS.
FORMATION OF PARTNERSHIP....	1–11	OF THE DISSOLUTION OF PARTNERSHIP—CONTRACTS SUBSEQUENTLY MADE.....	23–25
RIGHT OF ONE PARTNER TO SUE ANOTHER AT LAW.....	12–15	SURVIVING PARTNER.....	26–29
WHAT CONTRACTS BY ONE PARTNER BIND THE FIRM.....	16–22	ACTIONS BETWEEN.....	30–33
		MINING PARTNERSHIP.....	34–42

Formation of Partnership.

SECTION 1. 1st. Limited partnerships for the transaction of mercantile, mechanical, mining or manufacturing, business within this state, may be formed by two or more persons, upon the terms and subject to the conditions and liabilities prescribed in this act; but nothing contained in this act shall authorize such partnerships for the purpose of banking or insurance.

2d. The said partnership may consist of one or more persons, who shall be called general partners, who shall be jointly and severally responsible as general partners are by law, and of one or more persons who shall contribute to the common stock a specific sum, in actual cash payment as capital, who shall be called special partners, and who shall not be personally liable for any debts of the partnership, except in cases hereinafter mentioned.

3d. The persons forming such partnerships shall make

and severally sign a certificate, which shall contain the name or firm under which said partnership is to be conducted, the names and respective places of residence of all the general and special partners, distinguishing who are general and special partners, the amount of capital which each special partner has contributed to the common stock, the general nature of the business to be transacted, and the time when the partnership is to commence, and when it is to terminate.

4th. No such partnership shall be deemed to have been formed, until a certificate, made as aforesaid, shall be acknowledged by all the partners, before some officer authorized to take acknowledgment of deeds, and recorded in the office of the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose, open to public inspection; and if the partnership shall have places of business situated in different counties, a copy of the certificate, certified by the recorder in whose office it shall be recorded, shall be filed and recorded in like manner in the office of the recorder in every such county. If any false statement shall be made in any such certificate, all the persons interested in the partnership shall be liable as general partners for all the engagements thereof.

5th. The partners shall, for three successive weeks immediately after such registry, publish a copy of the certificate above-mentioned in a newspaper printed in the county, where their principal place of business is situated, and if no such paper be there printed, then in a newspaper in the state nearest thereto; and in case such publication be not so made, the partnership shall be deemed general.

6th. Upon every renewal or continuation of a limited partnership, beyond the time originally agreed upon for its duration, a certificate thereof shall be made, acknowledged, recorded and published, in like manner as is provided in this act for the original formation of limited partnerships; and every such partnership, which shall not be renewed in conformity with the provisions of this section, shall be deemed a general partnership.

7th. The business of the partnership shall be conducted

under a firm in which the names of the general partners only shall be inserted, and the general partners only shall transact the business. If the name of any special partner shall be used in such firm, with his consent or privity, or if he shall personally make any contract respecting the concerns of the partnership, with any person except the general partners, he shall be deemed and treated as a general partner.

8th. During the continuance of any partnership, under the provisions of this act, no part of the capital stock thereof shall be withdrawn, nor any division of interests or profits be made, so as to reduce such capital stock below the sum stated in the certificate before-mentioned. If at any time during the continuance, or at the termination of the partnership, the property or assets shall not be sufficient to pay the partnership debts, the special partners shall severally be held responsible for all sums by them in any way received, withdrawn or divided, with interest thereon from the time when they were so withdrawn, respectively.

9th. No general assignment by such partnership, in case of insolvency, or where their goods and estates are insufficient for the payment of all their debts, shall be valid, unless it provide for a distribution of the partnership property among all the creditors, in proportion to the amount of their several claims.

10th. In case of an assignment, as provided for in the preceding section, the assent of the creditors shall be presumed, unless within sixty days after notice thereof, they shall dissent; and no such assignment shall be valid unless notice thereof shall be given in some newspaper printed in the county where the place of business of the party making it is situated, or if no newspaper be printed in such county, then in some newspaper printed in the state nearest thereto, within fourteen days after the making such assignment.

11th. All suits respecting the business of such partnership, shall be prosecuted by and against the general partners only, except in those cases in which provision is made in this act; that the special partners shall be deemed general partners, and that special partnerships shall be deemed general partnerships, in which cases all the partners deemed

general partners may join or be joined in such suits, and excepting also those cases where special partners shall be held severally responsible on account of any sum by them received or withdrawn from the common stock, as before provided.

12th. No dissolution of a limited partnership shall take place, except by operation of law, before the time specified in the certificate before mentioned, unless a notice of such dissolution shall be recorded in the recorder's office in which the original certificate, or the certificate of renewal or continuation of the partnership, was recorded, and unless such notice shall also be published for three successive weeks in some newspaper printed in the county where the certificates of the formation of such partnerships were published, according to the provisions of this act; and if no newspaper shall, at the time of such dissolution, be printed in such county, then the notice of such dissolution shall be published in some newspaper in this state nearest thereto.

13th. In all other cases, not otherwise provided for in this act, the members of limited partnerships shall be subject to all the liabilities and entitled to all the rights of general partners. *Gen. Laws*, 4812–4824.

SEC. 2. The following form is appliable for limited partnerships:

FORM.

Certificate of Limited Partnership.

This is to certify, to all to whom these presents shall come: That we whose names are hereunto severally described, have entered into a limited partnership within the state of California, under and by virtue of an act of the Legislature of said state (and acts supplementary thereto) passed the fourth day of April, A.D. 1850, entitled "An act to authorize the formation of limited partnerships," upon the terms and liabilities hereinafter set forth, to wit:

1st. The said partnership is to be conducted under the name and style of .....

2d. The names of the general partners in said firm are ...., and are residents of ....., and the names of the special partners are ...., and are residents of ..... state aforesaid.

3d. The said special partner ...., has contributed to the common stock ..... dollars, and the said special partner ...., has contributed to the common stock ..... dollars.

4th. The nature of the business to be transacted by the said firm is [here state the business which is intended].

5th. The said partnership is to commence immediately at and after the signing of this certificate, and is to terminate on the .... day of .... A.D. one thousand eight hundred and ....

Made and severally signed by the said partners at the [city or town of] .... on the ....day of ...., one thousand eight hundred and ....

....
....
....

NOTE.—This certificate must be acknowledged by all the parties before it is recorded.

SEC. 3. A partnership is usually constituted as between the parties themselves, by an agreement between them to share the profits and losses of their joint undertaking, whether it have reference to a trade or business, or merely to some particular adventure. *Ex parte Geller*, 1 Rose, 297.

SEC. 4. No stranger can be introduced into the firm without a concurrence of all the members. The contract of partnership must be voluntary. *Kingman* vs. *Spurr*, 7 Pick. 235, 238.

SEC. 5. The *delectus personæ* (choice of person), as it is called, is so essentially necessary to the constitution of a partnership, that even the executors and representatives of partners themselves do not in their capacity of executors and representatives, succeed to the state and condition of partners. 3 *Kent's Com.* (5th Ed.) 55, 56.

SEC. 6. In order to constitute a partnership, the parties *must join together their money, goods, labor or skill*, for the purpose of trade. One partner may therefore bring into the trade money, another goods, and a third labor and skill, and they will thenceforward be partners, as between themselves, provided they share proportionally the profit and loss of the concern. *Collyer on Part.* Sec. 16.

SEC. 7. *Partners to Share Equally.*—In the absence of any special agreement between partners upon the subject, the rule of law is, that partners are to share equally both profits and losses; and the mere fact that partners have put in unequal amounts of capital into the common stock, or that one has put in all the capital, and the others only their skill and industry, will make no difference in the rule. *Griggs* vs. *Clark*, 23 Cal. 427.

SEC. 8. It seems that the right to participate in profits,

and the liability to contribute to losses, create a partnership, however unequal the shares may be and although one party has no direct interest in the capital of the firm, or may have no right to any definite aliquot proportion of the profits. Again, to constitute a partnership between the parties, there must be a communion of profit between them. A communion of profit implies a communion of loss; for every man who has a share of the profits of a trade ought also to bear his share of the loss. But an express stipulation is not necessary to the sharing of the profit and loss—that is an incident to the joint business. *Barrett* vs. *Swann*, 17 Maine, 180; 16 *Johns.* 34.

SEC. 9. An *alien ami* (friend) may be a partner. *Collyer on Part.* Sec. 14. But it seems an alien enemy cannot be a partner. 16 *Johns.* 438. A *femme-covert* cannot sanction this relation, except by some custom or upon the civil death of her husband, or where he has deserted her and abjured the realm. *Collyer on Part.* Sec. 15.

SEC. 10. A man may, on entering into partnership, stipulate that, as between himself and his copartners, he shall not be liable to the losses of the concern (*Bond* vs. *Pittard*, 3 M. & W. 357, 361); and on the other hand a participation in the profits and losses, whatever may be its effect with regard to the rights of strangers does not create a partnership, as between the parties, if the fact negative any intention or agreement on their part that it should have such operation; for although, where the existence of a partnership between individuals, *quoad* strangers, is established, the law will presume that the parties have agreed to be partners *inter se;* yet this presumption may be rebutted. *Hazard* vs. *Hazard*, 1 *Story's* C. C. 371, 374, 375. Thus, the loan of money by A to B, on a bond securing the payment, with five per cent. interest, and a covenant that the lender should also have a share in the profits of a trade, which the borrower conducted with a third party, but should not be liable to losses, does not create a partnership, but amounts to a mere usurious contract, there being no *bona fide* intention to become partners. *Moses* vs. *Wilson*, 4 T. R. 353.

SEC. 11. If several persons agree upon an adventure, and each is to furnish a certain proportion of goods for the

same, the whole of such adventurers are not liable, jointly, for the share of each, but each is liable individually, to the party who supplied his share, and no partnership arises as to the goods till they are mixed in a common stock. *Saville* vs. *Robertson*, 4 T. R. 720. But where the agreement is for a joint purchase for the adventure, the joint interest and partnership commences, and the joint responsibilities attach, immediately the goods are bought. *Collyer on Part.* Sec. 512.

Right of one Partner to Sue another at Law.

SEC. 12. It is a clear general rule, that one partner cannot sue his copartner at *law* in respect of the partnership accounts, or in any other matter connected with the partnership transactions; whether the firm exist for general purposes or have reference only to a particular trade or branch thereof. *Smith* vs. *Barrow*, 2 B. & C. 401. Nor can such a partnership claim become the subject of a set-off (2 *Bing.* 170); for this reason, that a court of law cannot do effectual justice between the parties, the investigation and settlement of their accounts and affairs being peculiarly the province of a court of equity. *Collyer on Part.* Sec. 264, *et seq.*

Therefore, one partner cannot sue his copartner for money received by the latter for the use of the firm, nor for goods sold, or money lent to or for work done, or money paid for the firm. And it makes no difference that the money, in respect of which one partner claims contribution from his copartner, was paid by him under compulsion of law. *Sadler* vs. *Nixon*, 5 B. & Ad. 936.

SEC. 13. It is also a settled rule, that if partners *finally* balance *all* their accounts, and a certain sum found to be due to one of them thereon, the partner against whom the balance is struck may be sued at law to recover the amount, without there having been any express promise on his part to pay the same; and the same rules holds as to money found to be due from, or agreed to be paid by, one partner to another on the winding up of any adventure in which they have been engaged. *Rackstraw* vs. *Imber*, Holt, 368. As for the reason for and the limits of this rule, see the re-

marks of Wilde, J., in *Fanning* vs. *Chadwick* (3 Pick. 423), and in *Williams* vs. *Henshaw* (11 Pick. 82), per Morton, J.

SEC. 14. If one of several plaintiffs constituting a firm, be also a partner in another firm, against which the action is brought, such action cannot be maintained, for a person cannot be one of the plaintiffs, and also one of the defendants in a suit, although he be not named as a defendant on the record. 2 *B. & P.* 120.

SEC. 15. The fact of a man's becoming a partner in a company, will not defeat his right to sue the company, in respect of a cause of action which had accrued to him prior to his becoming a member thereof. *Lucas* vs. *Beach*, 1 M. & G. 417.

What Contracts by one Partner bind the Firm.

SEC. 16. The general rule is, that the act or contract of one partner, with reference to and in the ordinary course and management of the partnership, business and affairs, is, in point of law, the act or contract of the whole firm, and binding on them, even although it violate some private arrangement between the partners. *Hawken* vs. *Bourne*, 8 How. 703.

SEC. 17. When a partnership is carried on in the name of the individual, a note in common form, signed by such individual, will not, *prima facie*, bind its copartners; and upon the question, whether it was given for the use of the copartnership, the burden of proof is upon the holder. *Manuf. and Mech. Bank* vs. *Welnship*, 5 Pick. 11.

SEC. 18. *Firm Indorsement of Note*—When one of two partners indorse a note in the name of the firm, as an accommodation for a third person, without the authority or consent of the other partner, such other partner is not bound by the indorsement, as to any party taking the note with notice that the indorsement was made in the character of surety; and in such case the burden of proving the authority or consent of the copartner rests upon the person holding the note. 37 *Cal.* 113.

A promissory note made in the firm name of the partnership, but for the private use of the partner making it, is binding on the firm, in the hands of an innocent holder,

though not in the hands of one having knowledge of the fraud. The finding of the district court, on the question of the knowledge of the fraud, and as to the question of payment, will not be disturbed when the cause comes up a second time for consideration. *Rich* vs. *Davis*, 6 Cal. 141.

SEC. 19. It was formerly a question of some doubt how far one partner could bind the firm by signing, in the name of the firm, but without their knowledge, a guaranty for the debt of a third person. It has been held "that if one give a guaranty in the name of all the partners, it binds all;" and it would seem from the case of *Ex parte Gardom* (15 Ves. jun. 286), the same opinion was held; but the point did not undergo much investigation in that case. But in another case (*Duncan* vs. *Lowndes*, 3 Camp. 481), it appeared that one of two partners had signed a guaranty in the name of the firm, and it was held that "as it was not usual for merchants in the common course of business to give collateral engagements of that sort, the plaintiff should prove that the partner signing had authority from his copartner to sign the partnership firm to the guaranty." And this is now recognized as the true rule on this subject.

SEC. 20. In a recent case, where one of two attorneys who were in partnership, signing, in the name of the firm, an undertaking to pay the debt and costs in an action, in consideration of the defendant being discharged out of custody, it was held that such undertaking did not bind the firm, it not being a transaction in the usual course of the business of attorneys, and there being no evidence that the guaranty was given in pursuance of the ordinary practice of the parties. And the same rule has been acted on in other cases. 5 *Q. B.* 833; 4 *Exch.* 623.

SEC. 21. And where there is an authority in a partner, either by special agreement or otherwise still to bind the firm, it must have reference to the regular course of the partnership business, and it must be confined to advances made or given to the partnership, as constituted, at the time of the guaranty. It cannot be extended to new advances or credits after a change of any of the original partners by death or retirement. *Collyer on Part.* Sec. 421; *Story on Part.* Sec. 127.

SEC. 22. Where one partner gives the acceptance of the firm in payment of his separate debt, without authority from his copartner, such acceptance does not bind the firm, and that the petitioners cannot proceed against the joint estate. *In Ex parte Goulding* vs. *O'Neill* (2 G. & J. 118), per Vice Chancellor. The principle of this decision seems to be, that the mere circumstance of the debt which forms the consideration for the bill, being due only from the partner who actually accepts or indorses it, ought to induce the creditor to inquire, whether the separate debtor had the express authority of his copartners to give the instrument as a security for his debt; and that fraud shall be presumed, unless the express authority of one partner thus to apply the partnership property be established. By the case of *Heath* vs. *Sansom* (2 B. & Ad. 291), in which it would appear to have been held, that if it were shown that the bill or note originated under such circumstances, even an indorsee of such bill or note could not sue the firm thereon without proving he took it for value. See *Monroe* vs. *Cooper*, 5 Pick. 412; 4 *How.* (U.S.) 404; 2 *Caines*, 246. But this latter principle must be received with the following qualification, viz: that in such a case, an indorsee cannot be put to prove that he gave value for the bill, unless he be affected with knowledge of the fraud. 12 *Peters*, 229; 3 *Pick.* 9.

Of the Dissolution of Partnership, and of Contracts subsequently made.

SEC. 23. A partnership may be dissolved:

1st. By the act of the parties, as by their mutual consent; and where no specific period is limited for the continuance of the partnership, either party may dissolve it at any time.

2d. By the act of God, as by the death of one of the partners.

3d. By operation of law, as where one of the partners becomes bankrupt.

4th. Where the partnership is formed to effect a particular object which is found to be impracticable.

5th. By the reason of the willful fraud or other gross misconduct of one of the copartners. 3 *Ves.* 74; *Collyer on*

Part. Sec. 113. Or in the manner prescribed in the twelfth division of the first section of this chapter.

SEC. 24. *Notice of Dissolution.*—To effect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. *Johnson* vs. *Totten*, 3 Cal. 343.

SEC. 25. The publication of the notice of dissolution in a paper taken by the plaintiffs, is a fact from which a jury may infer actual notice. The court has no right to charge the jury in regard to conclusions of fact. *Treadwell et al.* vs. *Wells et al.*, 4 Cal. 260.

Surviving Partner.

SEC. 26. *May Dispose of the Assets.*—A surviving partner has under the statute of May, 1850, regulating the settlement of the estates of deceased persons (Sec. 198), the exclusive right of possession and the absolute power of disposition of the assets of the partnership. *Allen* vs. *Hill*, 16 Cal. 113.

SEC. 27. *Settlement of Partnership Affairs.*—When the partnership is dissolved by the death of one of its members, the surviving partner is to wind up the affairs of the partnership, and pay its debts out of the assets, if sufficient, and divide the residue, if any, among those entitled to it. *Gleason* vs. *White*, 34 Cal. 258.

SEC. 28. The relation of debtor and creditor, between the surviving partner, and the representatives of the deceased partner does not arise until the affairs of the partnership are wound up and a balance is struck, and this balance is to be struck after all the partnership affairs are settled, and not while they are being wound up. *Gleason* vs. *White*, 34 Cal. 258.

SEC. 29. *Claim of Surviving Partner against Estate of Deceased Partner.*—If the partnership is indebted to the surviving partner, this debt is a contingent claim against the estate of the deceased partner, which does not become absolute until the partnership affairs are settled, and it is ascertained that there are no partnership assets to pay the same. *Gleason* vs. *White*, 34 Cal. 258.

Actions Between.

SEC. 30. *Replevying Partnership Property.*—One part-

ner cannot sustain an action againt his copartner for the delivery of personal property belonging to the partnership. *Buckley* vs. *Carlisle*, 2 Cal. 420.

SEC. 31. *Suit at Law.*—Where the plaintiffs and defendants entered into a partnership, by the terms of which the plaintiffs were to advance a certain sum of money and materials for a saw mill, which they did, and the defendants removed the materials furnished by plaintiffs and appropriated the same, including the money, to their own use: *Held*, that the plaintiffs had a right to sue therefor at law. and for damages caused by defendants' violation of the partnership contract. *Crosby* vs. *McDermitt*, 7 Cal. 146.

SEC. 32. Partners cannot sue one another at law for any of the business or undertakings of the partnership. This can only be done in chancery by asking for a dissolution and an account. *Stone* vs. *Fouse*, 3 Cal. 292; *Russell* vs. *Ford*, 2 Cal. 86; *Nugent* vs. *Locke*, 4 Cal. 381; *Barnstead* vs. *Empire Mining Co.*, 5 Cal. 299.

SEC. 33. A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure, where in consideration of outfits and advances made by plaintiffs, the defendant agreed to account for and pay over a proportion of the proceeds of his labor, and speculations of every kind for a certain period of time, although the parties may not have been technically partners. *Garr* vs. *Redman*, 6 Cal. 574.

Mining Partnership.

SEC. 34. All written contracts of copartnership for mining purposes upon the lands of the United States within this state, formed by two or more persons, shall be subject to the conditions and liabilities prescribed by this act.

Any member of a copartnership, or his successor in interest, in any mining claim, who shall neglect or refuse to pay any assessment, or shall neglect to perform any labor or other liability incurred by the copartnership agreement, may, after the expiration of sixty days after such assessment, labor or other liability, has become due, be notified in writing by any remaining partner or partners, or by his or their agents, that such assessment, labor or liability, is due, which written notice shall specify the name of such mine

and the district wherein it is located, and shall particularly mention the liability which has been incurred; and if such delinquent reside within the state he shall be personally served with such notice; and if the person so notified shall refuse or neglect, for thirty days after service of such written notice, to comply with the requirements of the copartnership agreement, the remaining partner or partners may sell the interest of such delinquent partner in and to such mining claim.

All sales under the provisions of this act shall be at public auction, and by giving five days' notice thereof, by posting written notices in three public places within the mining district where such mine is located. The notice shall also specify the extent of the interest to be sold, and the name of the delinquent partner or partners, and the time and place of such sale, which place shall be within the district where the mine is located. The purchaser at such sale shall acquire all the rights and title of the delinquent partner.

If any delinquent partner in any mine is absent from the state, or resides in any other state or territory, the notice to such delinquent shall be by publication, once a week for four months, in some newspaper published in the county where the mine is located; or if there be no newspaper in the county, then such notice shall be published in some newspaper in an adjoining county. After the expiration of the time of such publication, the interest of such delinquent shall be sold in the manner prescribed in this section.

This act shall take effect from and after its passage. *Gen. Laws*, 4649–4652.

SEC. 35. *What Constitutes a Mining Partnership.*—If two or more persons acquire a mining claim for the purpose of working the same and extracting the mineral therefrom, and actually engage in working the same, and share according to the interest of each the profit and loss, the partnership relation subsists between them, although there is no express agreement between them to become partners, or to share the profits and losses. *Durgea* vs. *Burt*, 28 Cal. 569.

SEC. 36. The parties owning a mining claim as tenants in common and engaged in working the same, are partners. *Dougherty* vs. *Creary*, 30 Cal. 290.

SEC. 37. An agreement between one or more persons who claim an undeveloped mine and another person, that if the latter will devote his labor and skill in exploring and developing the mine, the former will furnish him in tools and provisions, and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits by the parties after developement, constitutes one of those qualified partnerships common in California, known as mining partnerships. *Settembre* vs. *Putnam*, 30 Cal. 490.

SEC. 38. *Contract Concerning Mining Partnership.*—Where a person claiming an undeveloped mine, agrees with another that if he will devote his labor and skill in its developement, the former will furnish him with tools and provisions, and give him an equal interest in the mine in case it shall prove valuable, the latter is entitled to an equal interest in the mine when it becomes valuable, if he devotes his labor and skill until that time. 30 Cal. 490.

SEC. 39. Where a mining company, not incorporated, forms a trading partnership with an individual under a firm name, each member of the mining company is a member of the firm. *Rich* vs. *Davis & Co.*, 6 Cal. 163.

SEC. 40. Where the several owners of a mine unite and co-operate in working the same, they form a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has some rules peculiar to itself. *Skillman* vs. *Lachman*, 23 Cal. 198. The law does not, in cases of mining partnership, imply any authority, either to a member of such partnership or to its managing agent, to bind a company or its individual members, by a promissory note or a contract of indebtedness, executed in the name of the company; but it is incumbent on the party claiming to hold the company for such indebtedness, to show that the person executing or contracting the same in the name of the company had power and authority to do so. 23 *Cal.* 198.

SEC. 41. *Mining Claim of a Mining Partnership is Partnership Property.*—The mining grounds belonging to and worked by a mining partnership and acquired for mining purposes, whether purchased with partnership funds or

brought into the concern by individual members as a portion of the capital stock is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property. *Duryea* vs. *Burt*, 28 Cal. 569.

SEC. 42. *Dissolution of Mining Partnership.*—One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. *Duryea* vs. *Burt*, 28 Cal. 569; *Skillman* vs. *Lachman*, 28 Cal. 198.

CHAPTER XVI.

CONTRACTS OF SALE.

[See Sec. 28, page 44.]

SECTION 1. In order to constitute a valid sale of personal property against creditors, there must be, according to the statute of this state, an immediate delivery thereof, accompanied by an actual and continued change of possession. *Samuels* vs. *Gorham*, 5 Cal. 226; *Whitney* vs. *Stark*, 8 Cal. 514.

SEC. 2. The change of possession is required as a protection against creditors and subsequent purchasers. *Page* vs. *O'Neal*, 12 Cal. 433; *Stewart* vs. *Scannell*, 8 Cal. 80; *Malone* vs. *Plato*, 22 Cal. 103.

SEC. 3. The change of possession, or the delivery of the property sold to the purchaser, is not necessary to the validity of the contract between the vendor and vendee, but is only so as to creditors and subsequent purchasers. *Vishnor* vs. *Webster*, 13 Cal. 58; *Montgomery* vs. *Flint*, 5 Cal. 366; *Thornburg* vs. *Hand*, 7 Cal. 554; *Bickerstaff* vs. *Doub*, 19 Cal. 109.

SEC. 4. In reference to the sale of personal property, the contract is valid as between the parties, without a change of possession. But in regard to third parties, to make the contract good as against them, the possession must be changed. The object contemplated by the law is the protection of others against fraud. This is accomplished by giving *notice* of the sale; and this notice is given

by a change of possession. *Mitchell* vs. *Steelman*, 8 Cal. 375.

As the object of changing the possession is to give notice to subsequent purchasers, it would seem that although the possession was not in fact changed, yet if the subsequent purchaser takes with actual notice, he is not injured, and the first sale must stand. As the end contemplated by the law has been attained, the intent of the law has been fulfilled, and the protection designed by it accomplished. The fifteenth section of our statute of frauds only makes the sale of personal property without a change of possession "conclusive evidence of fraud as against subsequent purchasers in *good faith*." If he has actual notice, he cannot be a purchaser in good faith. 8 *Cal.* 375.

SEC. 5. That a sale of personal property may be good as against creditors and subsequent purchasers, the statute requires that the vendee must take *actual* possession, open and unequivocal, such as will carry with it unmistakable marks of ownership. The possession must be continuous, not taken to be returned again—not formal, but substantial. It need not continue undefinitely, but it must continue long enough to give character to the claim of it by the vendee. *Stephens* vs. *Irwin*, 15 Cal. 503; *Engles* vs. *Marshall*, 19 Cal. 320.

SEC. 6. In order that a verbal contract for the purchase of goods or chattels at a price exceeding two hundred dollars may be saved from the operation of the statute of frauds by a delivery, there must be a transfer of possession evidenced by acts, and not by words merely. *Malone* vs. *Plato*, 22 Cal. 103.

SEC. 7. *Delivery of Possession.*—What constitutes a delivery depends on the character of the article and the circumstances of the case. *Chaffin* vs. *Doud*, 14 Cal. 384. Where the thing purchased is susceptible of *actual and immediate* delivery, such actual and immediate delivery must be had. *Stevens* vs. *Stewart*, 3 Cal. 140. By an immediate change of possession, is not meant (in all cases) a delivery instanter, but the character of the property sold, its situation and all the circumstances, must be taken into consideration in determining whether there was a delivery within a reasonable

time, so as to meet the requirements of the statute, and this will be often a question of fact for a jury. *Samuels* vs. *Gorham*, 5 Cal. 226; *Lay* vs. *Neville*, 25 Cal. 545. As, where plaintiffs purchased of B, a certain number of cattle, and presented to C, the agent of B, an order for their delivery. C pointed out to plaintiffs, the cattle as they were grazing in view, and said to them: "I deliver you the possession." The plaintiffs then employed C to continue in charge of the cattle, who remained in charge until they were seized by the defendants: *Held*, that this was a delivery as immediate and complete as the nature of the case would admit, and was followed by an actual and continued change of possession. *Montgomery* vs. *Hunt*, 5 Cal. 366; *Hodgkins* vs. *Hook*, 23 Cal. 584.

Where cattle are running at large, and after being purchased they are gathered together, and marked with the brand of the purchaser, constitutes a good delivery and continued change of possession, although they be allowed to roam on their accustomed pasture afterward. But the mere execution of a bill of sale, and the delivery to the purchaser of the branding iron, unaccompanied by any other acts, does not constitute a delivery of possession. *Walden* vs. *Murdock*, 23 Cal. 540.

SEC. 8. Words alone, unaccompanied by some act, which is calculated to give some notoriety to the change or afford some notice to the public that a change of ownership has been effected, will not constitute a delivery. *Gardet* vs. *Belknap*, 1 Cal. 399.

SEC. 9. *Segregation of Property.*—If goods are sold, while mingled with others, by number, weight or measure, the sale is incomplete, and the title remains in the seller, until the bargained property is separated and identified. A sale of a chattel cannot apply to any article, until it is clearly designated and its identity ascertained, as where there is a sale of a given number of cattle then running in a herd of a larger number, is an executory contract, and does not apply to any particular cattle, until the number sold have been separated from the herd. *McLaughlin* vs. *Piatti*, 27 Cal. 451.

SEC. 10. The owner of a quantity of flour on storage in

a warehouse, may sell all to different persons, in quantities less than the whole, by giving to each person an order on the warehouseman, which order, when delivered to him, he may accept, and by charging the owner with the amount of each order so accepted, and by giving a receipt to each of the purchasers for so much flour as is indicated by each order, and crediting each purchaser with the amount of his purchase on his books, is a sufficient delivery of possession without a separation of the various lots. But where he sells only a part of the goods on storage, those sold, if all together and of the same mark, must be separated from the larger mass in order to change the possession. It would be a sufficient delivery, if *all* the goods of the vendor in the hands of a third party were sold, if the purchaser should present the vendor's order for the goods, take a receipt for them, and have the vendor charged, and himself credited with them on the books of the warehouseman. *Horr* vs. *Barker*, 8 Cal. 603.

SEC. 11. *Warehouse Receipt.*—The delivery of a warehouse receipt, which was given to A, stating that the goods named and described therein are deliverable on the return of the receipt, is sufficient, *prima facie*, to pass the title to B, who, being in possession of the receipt, presents the same. There is no substantial difference in this respect between a warehouse receipt and a bill of lading. *Horr* vs. *Barker*, 8 Cal. 609.

SEC. 12. *Time.*—Delivery, as to the time when it should be perfected, depends on the nature of the thing. Hay cannot be delivered until it is in a condition to be taken into possession. Growing crops are not goods and chattels, within the meaning of the statute of frauds, and will pass by deed of conveyance from the very necessity of the case, as they are not susceptible of manual delivery until harvested and reduced to actual possession. *Bours* vs. *Webster*, 6 Cal. 661; affirmed in *Bernal* vs. *Hovious*, 17 Cal. 541.

SEC. 13. The memorandum required by the statute of frauds to be entered by an auctioneer in his sale-book must be made at the very time of the sale, or the vendee will not be bound by the contract. So *held* in a case where the sale at auction took place in the forenoon, and the memorandum

was not made by the auctioneer before the evening of the same day. *Craig* vs. *Godfrey*, 1 Cal. 415.

SEC. 14. Where an auctioneer sells a balance of goods, without specifying their quantity, he has a reasonable time to ascertain it; when this is done, and a bill of particulars is made out and delivered to the purchaser, who pays the purchase money or a portion of it, the contract becomes executed, and the auctioneer will not afterwards be permitted to allege a mistake as to the quantity sold. Until an account is rendered of the quantity the purchaser is completely within the auctioneer's power; and this power would be continued, if afterwards he were allowed to allege a mistake. If he chose to act in bad faith, he might take advantage of a rising or falling market, and increase or diminish the quantity accordingly. Besides, the purchaser, after receiving the bill which is rendered, is presumed to act with reference to it, and to enter into other contracts, relying upon the faith of it. Where a mistake occasions loss, it must be suffered by him who makes it. *Burgoyne et al.* vs. *Middleton*, 4 Cal. 66, 67.

SEC. 15. *Fraud.*—The rule is the most just and reasonable, that where a person, clearly insolvent, purchases goods from another, on credit, and conceals the fact of insolvency from the vendor, he is guilty of such fraud as vitiates the sale. The insolvency ought to be clear, and not subject to any reasonable doubt. And the purchaser must be held to know the true state of his own business; and, if he does not, the consequences should not be visited upon the party who had not the means of knowing. *Seligman* vs. *Kalkman*, 8 Cal. 215.

SEC. 16. A sale of personal property, with intent to benefit the seller and injure creditors, is fraudulent and void. *Riddell* vs. *Shirley*, 5 Cal. 488.

SEC. 17. *When not Void.*—A *bona fide* purchase made by a creditor, of the goods of his debtor, who is in insolvent circumstances, is not fraudulent, merely because such creditor thereby obtains a preference over other creditors, and may be aware at the time that his purchase will have the effect of delaying or defeating the other creditors in the collection of their debts. *Walden* vs. *Murdock*, 23 Cal. 540.

The rule of law in regard to the right of a failing debtor to give a preference to some of his creditors, have no application to a sale for cash to a person not a creditor, although the proceeds may have been applied to pay creditors. *Marnlock* vs. *White*, 20 Cal. 598.

CHAPTER XVII.

WAGER, CONTRACT OF.

SECTION 1. *Wager.*—A wager is a bet; a contract by which two parties, or more, agree that a certain sum of money or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event. *Bouv. Law Dict.* 617.

SEC. 2. All notes, bills, bonds, mortgages or other securities or conveyances, whatever, in which the whole or any part of the consideration shall be for any money or goods, won by gaming or playing at cards, dice or any other game, whatever, or by betting on the sides or hands of any person gaming, or for reimbursing or repaying any money knowingly lent or advanced for any gaming or betting, or lent or advanced at the time and place of such gaming or betting, shall be void and of no effect, as between the parties to the same and as to all persons, except such as shall hold or claim under them in good faith and without notice of the illegality of the consideration of such contract or conveyance. *Gen. Laws*, 3324.

SEC. 3. *When Recoverable.*—Wagers are recoverable in this state as at common law, except such as are prohibited by law, or are against public policy, or calculated to effect the interest, character or feelings, of third parties. *Johnson* vs. *Fall*, 6 Cal. 359.

SEC. 4. *Bet on Elections.*—A party placing money in the hands of another for the purpose of making a bet on an election, in the name of the bailee but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the

purpose for which it was deposited. *Hardy* vs. *Hunt*, 11 Cal. 343.

SEC. 5. *Bailor.*—The bailor does not part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains, as between him and the principal, the money of the principal. 11 *Cal.* 343.

SEC. 6. *Retraction.*—Upon the retraction of the wager, the right to the possession of the money is in the agent or bailee, and he may maintain an action for it where the bailor interposes no objection. 11 *Cal.* 343.

SEC. 7. Money won at play cannot be recovered at common law. 2 *Cal.* 81.

SEC. 8. No action will lie to recover money lost at play in a common gaming house. The practice of gaming is vicious and immoral in its nature, and ruinous to the harmony and well-being of society. 3 *Cal.* 329.

SEC. 9. The plaintiff, being the keeper of a public gaming room, won of the defendant four thousand dollars at the game of *faro*. The money not being paid, an action was brought to recover it: *Held*, that it could not be sustained. Such a debt was not recoverable at common law. Doubted, 2 *Cal.* 66; affirmed, 3 *Cal.* 329; 1 *Cal.* 441:

1st. Four thousand dollars, if won under any circumstances, at what is called a *round game*, and in a private room, could not be recovered, because the amount is so large as to be excessive.

2d. The fact of its being won at a *bank game*, such as *faro*, makes its recovery unlawful.

3d. That is, being won at a common gaming house, by the owner and keeper thereof, would alone bar the recovery. Doubted, 2 *Cal.* 661; 1 *Cal.* 443, 444.

SEC. 10. At common law, all wagers were recoverable, except such as were prohibited by law, were against public policy, or calculated to affect the interest, character or feelings, of third parties. The common law having been adopted as the rule of decision in this state, it must be enforced, leaving all questions of its policy, as applied to a particular class of contracts, for the consideration of the legislature. 6 *Cal.* 361.

SEC. 11. A wager on an election is illegal and void, as against public policy; the direct effect of such wagers being to affect the purity of elections. 11 *Cal.* 347. An action to recover a wager of this sort cannot be maintained. The party depositing the money for this illegal purpose, may retract the illegal act. The money is not forfeited for the benefit of the stakeholder. He holds it as bailee of the depositor, who may resume it at any time before it is paid over to the winner. 11 *Cal.* 348.

SEC. 12. Wagers which tend to excite a breach of the peace, or are *contra bonas mores*, or which are against the principles of sound policy, are illegal; and no contract arising out of any such illegal transaction can be enforced. These are principles of the common law which have been adopted in this state. 1 *Cal.* 444.

SEC. 13. *Wagers.*—At common law, wagers made in respect to matters not affecting the feelings, interest or character, of third persons, or the public peace or good morals, or public policy, are legal contracts, which may be enforced by action. 37 *Cal.* 607.

SEC. 14. *Wagers upon Elections.*—Wagers upon the result of elections are against public policy, and are therefore void; and hence money put up in the hands of stakeholders may be recovered if the wager be repudiated and a return of the money be demanded at any time before the election has taken place, and the result has become generally known, but not thereafter. 37 *Cal.* 607.

SEC. 15. J made a wager with F, that Seymour would receive a majority of the votes cast in this state at the presidential election in 1868, and F made a wager with J, that Grant would receive a majority of said votes; the money was put into the hands of R, a stakeholder. After the election had taken place and the result had become known, J, having lost his wager, and demanded his money, but R, notwithstanding paid the money to F according to the terms of the wager. In an action by J against R to recover his stake, it was held that a recovery could not be had. 37 *Cal.* 607.

CHAPTER XVIII.

WORK AND LABOR.

	SECS.		SECS.
SPECIAL CONTRACTS	1– 8	IMPLIED LIABILITY FOR	19–32
ENTIRETY OF CONTRACT	9–18	DAMAGES	33–34

Special Contracts.

SECTION 1. *Contracts for Work, Labor and Services.*— These may be under seal, in writing, without seal and oral. They are frequently for work and labor, and material furnished or used in the service, as where I employ a carpenter to build me a house and furnish a portion of all the material. They are subject to all the general rules which govern contracts in relation to the sufficiency, legality and morality, of their consideration, and to the rights of the parties claiming under them. The contract may be express in all its parts, or it may be express only in relation to the manner the service is to be performed, leaving the time of performance and the price of the service to be implied. It may also be implied from the circumstances of the person for whom the service is performed and his obligation to have it performed; as, where a physician attends his child who is taken suddenly ill and requires his services. *Cowen's Treatise*, 108.

SEC. 2. Where there is an express contract for a particular amount and mode of payment, the party rendering the services must rely upon it. Thus, if I employ a man to build a house at a certain price, mentioning no time of payment, he will not be entitled to his payment until he has finished it. If I hire a laborer for one year at the rate of twelve dollars a month, without a special clause in the contract, he cannot recover his wages until the end of the year. 8 *Cow.* 63.

SEC. 3. Where the agreement is to perform a particular piece of work, or to labor for a certain period, whether the price is or is not specified in it, the person employed acquires no right to any part of his compensation until he has fully performed his part of the contract. The contract is

considered *entire*, and he cannot perform a part of it by doing a portion of the work, or working a portion of the period and then breaking off without his employer's consent, without not only forfeiting all right to recover for what he has done or the time he has labored, but also rendering himself liable for breach of his contract. Thus, where M agreed to work for P for a year, and worked ten months and a half and left, refusing to work longer, but in two days returned and offered to fulfill his contract, it was held, that having wantonly deserted P's service without his fault, he was guilty of violation of the contract, and P was under no obligation to receive him again or to pay him for his services for the ten months and a half. 8 *Cow.* 63.

SEC. 4. So, where one contracted to cure a flock of sheep of the scab, he was not permitted to recover for his services in curing a part, the remainder not being cured. 6 *D. & B.* 3.

SEC. 5. Where, however, the person contracting to do the service is an infant, and he performs a portion of it, he may recover what is the reasonable value of the services performed. 2 *Pick.* 332.

SEC. 6. The rule in relation to ordinary employment of a servant for a limited period, where a portion of the service is performed, and the remainder prevented by death or illness of the servant, and not by his willful default, is that he shall be paid for the time actually spent in the service its proper proportion of the price. 6 *Pick.* 326.

SEC. 7. In contracts for work and labor between masters and servants, there may be misconduct on the part of either master or servant which will justify the other party in rescinding the contract. Thus, if a master so maltreat his servant that he cannot safely remain in his employment, or as to indicate a willingness to be rid of him, the servant may leave him and recover his wages for the time he has served. But the employment of harsh language alone is not sufficient to warrant him in leaving. So, if the servant conducts himself improperly, as, if he assaults another of his employer's servants with intent to ravish her, or if he refuse to perform a reasonable command of his master, he may dismiss him, and the servant, although hired by the

year, cannot recover for the time he has served. 4 *Car. & P.* 208.

SEC. 8. Where a special contract for the performance of work is proved, but it is also shown that the contract has been deviated from, the judgment will not be reversed on the ground that the court below admitted testimony as to the value of plaintiff's services. *DeBoom* vs. *Priestly*, 1 Cal. 206.

Entirety of Contracts.

SEC. 9. *Entire Contract.*—The rule is well settled, that where a person agrees to work for a certain period, at such a price, or to perform certain services for such an amount, that he cannot break off at his own pleasure, and maintain an action for the work, so far as he has gone. Performance is a condition precedent to payment. *Hutchinson* vs. *Wetmore*, 2 Cal. 311.

SEC. 10. The plaintiff agreed to labor for defendant for eight months, at the rate of one hundred dollars per month for himself, and one hundred dollars for his wife; and stipulating that the defendant should give his note to plaintiff at the end of four months, payable at the expiration of his term of service; and that the wages for the last four months were not to be paid until the expiration of eight months from the commencement: *Held*, that the contract was entire for eight months' labor; and that no action would lie to recover the value of part of the services performed. *Hutchinson* vs. *Wetmore*, 2 Cal. 311.

SEC. 11. In suit to recover for services for half a year, under a contract to work for a whole year, plaintiff having quit the employment of defendant, it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover. *Hogan* vs. *Titlow*, 14 Cal. 255.

SEC. 12. Where the contract is not entire, as where one is employed to do certain work, and to be paid from time to time as it progresses, or to work for a year, and to be paid monthly or quarter-yearly, and in all cases where, by the terms of the agreement, payment is to be made on partial performance, an action will lie for money payable as fast as it becomes due by the terms of the contract. In such cases, however, the other party may show the damages which he

has sustained in consequence of the non-performance of the residue of the contract, in diminution or extinguishment of the claim established against him. In technical language, he may *recoupe* his damages. 14 *Wend.* 257.

SEC. 13. *Terms of Contract.*—Where a hired person continues in employment after the expiration of the contract, and without any new contract, the fair presumption is, that both parties understood that the same salary was to be paid. And it is therefore error, in a suit by the servant to allow him to recover upon a *quantum meruit*. *Nicholson* vs. *Patchin*, 5 Cal. 474.

SEC. 14. Where there is a special agreement for certain work, as, to build or repair a house or ship, and the price or time of payment is fixed, if the parties, by mutual consent, change the plan, the terms of the contract, as far as they will apply, will regulate the price and time of payment of the new work. Where, however, the change is so great that the terms of the contract do not apply to the new work, the latter is considered as done under a new and distinct agreement, both as to price and time of payment, and as neither is fixed by its terms, the price will be what the service is reasonably worth, and the payment will be due as the service is performed. 10 *Johns.* 36; 12 *Cal.* 274.

SEC. 15. If a builder contract to build a house of specified dimensions and with specific material, and deviate from the specifications, he cannot recover; but where one, not a builder, finishes work differently from the specification, and the employer accepts it, he may recover the contract price, deducting such a sum as it would require to complete it according to the specification. *Cow. Treatise*, 112.

SEC. 16. Where one has ordered a carriage or other chattel to be made for him by a mechanic, and it is made pursuant to the order, and, on being tendered to him, he refuses to accept and pay for it, it may be left in charge of a third person with notice to the customer, and an action maintained for the price; or it may be sold for the best price it will bring and an action be brought for the loss upon the sale. 15 *Wend.* 497.

SEC. 17. Where one contracts to do certain work by a

given time, but not to do a portion of it until directed by his employer, the employer cannot suspend the work so long as to prevent its completion within the time agreed upon. If he does, and then directs the work to be performed, the contractor is not limited by the contract price, but can recover upon the implied agreement to pay what the work so performed is worth. 4 *Wend.* 285.

So, if there be a special agreement, whether sealed in writing or oral, to do a piece of work, and it be done with the assent of the employer, although not pursuant to it, either in point of time or other respects, the contractor can recover what the work was reasonably worth. 4 *Wend.* 285.

SEC. 18. Where a contractor puts into an article better materials than he is required to by his contract, he cannot on that account recover more than the stipulated price, nor, after delivery of the article, require it to be returned because the buyer will not pay an increased price for it. So, where work is undertaken at a given price, the employer is not liable to pay a greater sum by consenting to alterations from the original plan, unless he is either expressly informed or must necessarily, from the nature of the work, be aware that the alteration will increase the expense. 3 *Car. & P.* 453.

Implied Liability.

SEC. 19. But where I make a verbal contract with you to sell me land, and I enter upon it and improve it, and you afterwards refuse to convey, whereby the contract is rescinded, I cannot recover for my labor expended upon the land. Nor can I if I enter upon another's land without his consent or color of right, and clear and improve it. Here, as there is neither a legal or moral obligation to pay me for my labor, a promise subsequently made to pay me for it would be without consideration and void. 5 *Johns.* 272.

SEC. 20. An action may be maintained for professional services performed at the defendant's request, by an attorney or counselor at law, a clergyman, a physician or surgeon, whether he be licensed or not. Formerly the fees of an attorney were regulated by statute, but the measure of their compensation is now left to the agreement, express or

implied, between them and their clients. 26 *Wend.* 451; 10 *Johns.* 244.

SEC. 21. A parent or master is not liable for services performed for his child or indented apprentice without his knowledge, unless in a case requiring immediate assistance; as where the child or apprentice was suddenly taken sick. 10 *Johns.* 249.

SEC. 22. A master is not, however, liable for necessaries or services performed for his hired servant during his sickness, unless at his special request. 2 *Esp.* 739.

SEC. 23. An action may be maintained against overseers of the poor for medical attendance upon a pauper, for whom they are bound to provide, if furnished at their request, or when not furnished with their knowledge, if they afterwards expressly promise to pay for it. But not otherwise. 10 *Johns.* 249.

SEC. 24. It has been remarked that where there is an express contract to perform a particular piece of work, or to labor for a certain price, so long as it remains unchanged, the contractor can only recover upon a performance of its terms. In actions upon all such contracts, and also in all actions for services, whether common, mechanical or professional, and whether to be performed at a fixed price or not, the defendant may, by way of recoupment, mitigate the damage or defeat the action altogether, according to the justice of the case, by showing that they were done unskillfully, or were worth less than the plaintiff's claim, or worth nothing. 7 *East*, 479.

SEC. 25. So, where an auctioneer is guilty of negligence, whereby his sale is void, he cannot recover for his services. 3 *Camp.* 451.

SEC. 26. An attorney cannot recover against his client for his services in an action where the judgment obtained by him is set aside for irregularity; nor for opposing a successful motion to set aside his proceedings; nor for money paid to satisfy the costs of a judgment of discontinuance obtained against his client in consequence of his negligence or ignorance. But proof that a judgment, as in case of nonsuit, was obtained against the client, is not of itself evidence of his negligence. The negligence must be gross.

If he acts in good faith, and to the best of his skill, and with a moderate degree of attention, he is not answerable. Nor is he answerable for an error or mistake on a point of law in regard to which a reasonable doubt may be entertained, or on a nice point of practice. 3 *Camp.* 17–19.

SEC. 27. The law compels no one to pay for services voluntarily performed for him, however beneficial to him, unless upon his express or implied request. This rule has been held in the following case: J, owned a stubble field in which B had a stack of wheat, which he had promised to remove in season for preparing the field for a fall crop. The time to remove it having arrived, J sent a request to B, which, in his absence, was delivered to his family, that the stack should be removed, as he wished next day to burn the stubble. The sons of B answered that they would remove it by ten o'clock next morning. After waiting until that hour, J set fire to the stubble in a remote part of the field, and finding the fire spreading rapidly and threatening to burn the stack, J set to work and removed it to a place of safety. The court held, that no action would lie for the service. 20 *Johns.* 28.

SEC. 28. An exception to this rule is made in the case of goods and vessel lost or abandoned in distress at sea, which was saved by other persons. Here the person who by his labor saves them, may claim a reasonable compensation for his services, and may also retain the possession of them until paid. 1 *Ld. Raym.* 393; *Abbott on Ship.* 356.

SEC. 29. *Monthly Salary.* — Where a party employed receives a regular specific monthly salary for his services, the presumption of law is, that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary. And to overcome this presumption he must show an express agreement for extra pay, otherwise he cannot recover. *Cany* vs. *Halleck*, 9 Cal. 198.

SEC. 30. *Implied Contract.*—In a suit by a female against two partners in a ranch, for services as servant to the farm. Under an implied contract, as on a *quantum meruit*, proof that plaintiff is the wife of one defendant is good under the general issue, as showing that there was no implied con-

tract to pay for the services. *Angulo* vs. *Sunol*, 14 Cal. 402.

SEC. 31. For domestic services rendered in such case by the wife of one partner, all living in the same house, the law does not imply a contract to pay for the service. 14 *Cal.* 402.

SEC. 32. The presumption that the person enjoyed the benefit of services, is bound to pay therefor what they are reasonably worth, may be rebutted by proof of a special agreement to pay a fixed amount, or in a particular manner, or by proof that the services were intended to be gratuitous. In an action for personal services, defendants asked an instruction to the effect, that if the plaintiff served the defendant upon an understanding that he was to have only his living—board, washing, lodging, etc.—as a compensation, and that he had received these, then defendant should recover, which instruction the court refused: *Held*, that the instruction was proper, and that for the error in refusing it the judgment for plaintiff must be reversed. *Moulin* vs. *Columbet*, 22 Cal. 508.

Damages.

SEC. 33. Where one is employed by another under a contract, at a stated salary, payable monthly or at a stated time, to act as his clerk, or transact business for him, and the employé neglects the business, the employer is not precluded from maintaining an action for damages for this neglect, by payment in full of the employé's wages, or by allowing the employé to sue and recover judgment, by refraining from interposing any counter claim for a breach of the employé's contract. *Stoddard* vs. *Treadwell*, 26 Cal. 294.

SEC. 34. Where the defendants, partners, employed plaintiff, on an agreement that a portion of his wages should be retained by defendants until a certain sum had accumulated, when plaintiff should be admitted as a partner; and defendants subsequently, but before the sum had accumulated, dissolved partnership: *Held*, that the defendants, by their acts having violated the special contract by dissolving their copartnership, the plaintiff was at liberty to sue on the special contract for damages, or declare for the value of his work and labor. *Adams* vs. *Pugh*, 7 Cal. 150.

CHAPTER XIX.

ABATEMENT.

	SECS.		SECS.
DEFINITION	1- 2	MISNOMER	12–14
JURISDICTION, CAUSE OF	3	MISJOINDER AND NONJOINDER	15–16
ANOTHER ACTION PENDING	4–11	DEATH, ABATEMENT BY	17

Definition.

SECTION 1. *Abatement, Plea of, in Justices' Courts.*—The pleas in abatement in justices' courts are usually to the jurisdiction, or that the defendants are not set forth by their proper names, or that the process which has been issued has not been issued and served as the statute directs. In deciding upon such pleas as these, if the facts constituting the plea in abatement be found true, the plea should be admitted by the justice. The opposite course would only subject the parties to costs, and determine nothing; for by *certiorari* the proceedings would be taken to a higher court, and on proof of any of the allegations made, the proceedings would be set aside.

SEC. 2. *Abatement in Pleading.*—Abatement in pleading is the overthrow of an action in consequence of some error committed in bringing or conducting it, when the plaintiff is not forever barred from bringing another action. 1 *Chit. Pl.* 434, 445.

Jurisdiction.

SEC. 3. *When to the Jurisdiction.*—Jurisdiction is a power constitutionally conferred upon a judge or magistrate to take cognizance of and decide causes according to law, and to carry his sentence into execution. *Bouv. Law Dict.* When therefore the power is wanting, either as it relates to the subject matter of the action or the remedy sought, the plea in abatement applies. Nor can the absence of jurisdiction be remedied by agreement; it is the law which gives it, and not the consent of parties. 1 *Const. R.* 478. Where there is an entire want of jurisdiction of the subject matter in the court, it is never too late to object to the jurisdiction. 1 *Ash.* 168; 2 *Cow. Treat.* 668.

Another Action Pending.

SEC. 4. *Another Action Pending.*—A plea to abate an action by reason of another action pending is not good, unless it show that the pending action was brought for the same cause as the one in which the plea is interposed. *Calaveras Co.* vs. *Brockway*, 30 Cal. 325.

SEC. 5. *The Parties Must be the Same.*—An action cannot be abated by a former action pending for the same cause unless the parties are the same. 30 *Cal.* 325.

SEC. 6. *Pendency of Prior Action.*—To support a plea in abatement founded on the pendency of a prior action, it is necessary to show that process was issued in such action. *Prim* vs. *Gray*, 10 Cal. 522.

SEC. 7. *The Pendency of One Suit may be Pleaded in Abatement of Another.*—A defendant cannot be harassed with several suits for the same matter at the same time. In such a case, the pendency of one suit may be plead in abatement of the other. *Seligman* vs. *Kalkman*, 8 Cal. 216.

SEC. 8. *When the Former Case is Defective.*—A plea in abatement of a former suit pending is no bar to an action when the complaint in that case is so defective that a judgment rendered thereon would be a nullity. *Reynolds* vs. *Harris*, 9 Cal. 341.

SEC. 9. *What must be Shown in an Answer in Abatement.*—In an action to recover land, an answer of another action pending, for the same cause, must show that the same title, the same injury and the same subject matter, are in controversy in both actions. *Larco* vs. *Clements*, 36 Cal. 132.

SEC. 10. *Answers must be Strictly Construed.*—Answers in abatement of an action are to be strictly construed. 36 *Cal.* 132.

SEC. 11. *Judgment on Issue in Abatement.*—If an answer in abatement is found true, the judgment should not be in bar, but that the suit abate. 36 *Cal.* 132.

Misnomer.

SEC. 12. *Misnomer.*—The misnomer of one of two defendants, when sued as a firm, as to his christian name, if material at all, must be taken advantage of by a plea in abatement. 8 *W. & S.* 485.

SEC. 13. *A Misnomer of Plaintiff—A Corporation.*—A misnomer of the plaintiff in an action by a corporation, must be taken advantage of by a plea in abatement. 2 *W. & S.* 156.

SEC. 14. *An Initial Letter between the Christian and Surname is no part of the Name.*—An initial letter, between the christian and surname of the party, is no part of the name, and the omission of it is not a misnomer or a variance. 4 *W. & S.* 329.

Misjoinder and Nonjoinder.

SEC. 15. *Misjoinder of Parties.*—An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner* vs. *Wilson*, 4 Cal. 313; *Dunn* vs. *Tozer*, 10 Cal. 170.

SEC. 16. *Where Part Owner Brings an Action.*—Where a part owner brings an action in form *ex delicto*, and the objection is not made by plea in abatement, the other part owner may afterwards sue alone. *Whitney* vs. *Stark*, 8 Cal. 516.

Death, Abatement by.

SEC. 17. An action shall not abate by death or other disability of a person, or by transfer of any interest therein, if the cause of action survive or continue. In case of the death or other disability of the party the court, on motion, may allow the action to be continued by or against his representatives or successor in interest. In case of any other transfer of interest the action may be continued in the name of the original party; or, the court may allow the person to whom the transfer is made to be substituted in the action. *Practice Act*, Sec. 16.

CHAPTER XX.

ABANDONMENT.

What Constitutes.

SECTION 1. Abandonment is the relinquishment of property by the possessor or owner, of all right, title and interest, by him held thereto, and they belong to the first occupant or possessor thereafter. *Bouv. Inst.* 195.

SEC. 2. To entitle the finder or subsequent possessor to such property the former owner must have wholly abandoned his title thereto, and even the acquisition by him who finds such property does not make it his, unless he takes possession of it by some outward act signifying an intention to possess it. The necessity of this outward act is founded on the principle that a will or intention cannot have legal effect without an outward act declaring that intention; and, on the other hand, no man can be said to have the dominion over a thing which he has no intention of possessing as his. Therefore, a man cannot deprive others of taking possession of vacant property by merely considering it as his without actually appropriating it to himself. The outward act or possession need not be manual; for any kind of possession, as simply having the custody of it, is in general a sufficient appropriation. The exceptions to the above rule are usually created by statute. *Bouv. Inst.* 195.

See MINES AND MINING CLAIMS, Ch. LXVI.

CHAPTER XXI.

ACKNOWLEDGMENTS.

SECTION 1. Acknowledgments of the execution of any instrument whereby any real estate is conveyed or may be affected, is provided for by the following enactments:

Section 1. Section four of an act entitled an act concerning conveyances, passed April sixteenth, eighteen hundred and fifty, is hereby amended so as to read as follows: Sec. 4. The proof or acknowledgment of every instrument whereby any real estate is conveyed or may be affected, shall be taken by some one of the following officers:

1st. If acknowledged or proved within this state, by some judge or clerk of a court having a seal, or some notary public or county recorder, or by a justice of the peace of the proper county where the conveyance is executed, and to be recorded only in such county.

2d. If acknowledged or proved without the state, and within any state or territory in the United States, by some

judge or clerk of any court of the United States, or of any state or territory having a seal, or by a commissioner appointed by the government of this state for that purpose, or by any notary public, commissioner of deeds or justice of the peace, authorized to take and certify the acknowledgment or proof of deeds to be used in his state or territory: *provided*, however, that where such proof or acknowledgment shall be taken and certified by any such notary public or commissioner of deeds other than commissioners of this state, a certificate of the secretary of state or territory shall also be affixed to the instrument so certified, to the effect that such notary public or commissioner of deeds other than commissioners of this state at the time of taking such acknowledgment or proof was such officer, that the signature affixed to such certificate is his genuine signature, and that he is authorized by law to take the acknowledgment of deeds within the state or territory or county in which he may be acting; and where such proof or acknowledgment shall be taken and certified by a justice of the peace, a certificate of the county clerk of the county in which such justice resides, or clerk of a court of record, shall also be affixed to the instrument so certified and to the like effect.

3d. If acknowledged or proved without the United States, by some judge or clerk of any court of any state, kingdom or empire, having a seal, or any notary public therein, or any minister, commissioner or consul, of the United States, appointed to reside therein: *provided*, however, that where such proof or acknowledgment shall be taken and certified by any such judge or clerk of court, or any notary public without the United States, the same shall be accompanied by the certificate of a minister or consul of the United States resident in such state, kingdom or empire, to the effect that such person was at the date of such proof or acknowledgment such officer, that the signature or seal, or both such signature and seal, of such officer is genuine, and that such officer is authorized by law to take the proof or acknowledgment [as the case may be] of deeds where he may be acting. When any of the officers above-mentioned are authorized by law to appoint a deputy, such acknowl-

edgment or proof may be taken by such deputy in the name of his principal.

Sec. 2. All acknowledgments or proofs heretofore taken of any instrument authorized by law to be recorded, acknowledged or proven and certified, or which may be certified in the manner herein-above provided, the record thereof shall be valid and of the like force and effect as if acknowledged or proven before the officer, and certified to in the manner heretofore required by law: *provided*, that nothing in this act shall be so construed as to affect in any manner the rights of any subsequent purchaser in good faith. *Pub. Laws*, 1866, 429.

SEC. 2. Thus it will be perceived, from the foregoing statute, that justices of the peace may take acknowledgments, when the conveyance is executed, and is to be recorded in the county in which he holds his office. The nineteenth section of the statute concerning conveyances empowers a married woman to convey her real estate; but such conveyance must be executed and acknowledged by herself and husband. And if the conveyance be executed and is to be recorded in the county where the justice of the peace exercises the duties of his office, he may take and certify their acknowledgments. The twenty-second section of said statute provides that the acknowledgment of a married women shall not be taken unless she shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by a credible witness; nor unless such married woman shall be made acquainted with the contents of such conveyance, and shall acknowledge, on an examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same.

SEC. 3. The following are forms of acknowledgments:

FORMS.

State of California, } ss.
County of ..... }

On this ..... day of ....., A.D. one thousand eight hundred and

seventy .., personally appeared before me, ..., a justice of the peace, in and for the said county, ... and ....., his wife, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument, as parties thereto, who each of them acknowledged to me that they each of them respectively executed the same freely and voluntarily, and for the uses and purposes therein mentioned. And the said ....., wife of the said ....., having been by me first made acquainted with the contents of said instrument, acknowledged to me on examination, apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my private seal (having no seal of office) the day and year in this certificate first above written.

....., [L.S.]
Justice of the peace.

State of California, } ss.
County of ..... }

On this ..... day of ..... A.D. one thousand eight hundred and seventy .., personally appeared before me, ..., a justice of the peace in and for the said ..... county, ... personally known to me to be the same person whose name is subscribed to the annexed instrument as a witness thereto, who being by me duly sworn, deposed and said, that he resides in ....., that he was present and saw ....., known to him to be the same person described in and who executed the annexed instrument, as a party thereto, sign, seal and deliver, the same; and that the said ..... acknowledged in the presence of said affiant that .. executed the same freely and voluntarily, and for the uses and purposes therein mentioned, and that he the said affiant subscribed his name to said instrument as a witness thereof.

In witness whereof, I have hereunto set my hand and affixed my private seal (having no seal of office) the day and year in this certificate first above written.

....., [L.S.]
Justice of the peace.

State of California, } ss.
County of ..... }

On this ..... day of ....., A.D. one thousand eight hundred and seventy .., personally appeared before me, ..., a justice of the peace in and for the said county, ... whose name .... subscribed to the annexed instrument as .... part .... thereto, personally known to me to be the same person .... described in and who executed the said annexed instrument, as part .... thereto, who ..... acknowledged to me that ..... executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my private seal (having no seal of office) the day and year in this certificate first above written.

....., [L.S.]
Justice of the peace.

State of California,
County of ..... } ss.

On this ..... day of ....., A.D. one thousand eight hundred and seventy .., personally appeared before me, ..., a justice of the peace in and for the said county, ... personally known to me to be the same person described in and who executed by power of attorney ..... the annexed instrument as the attorney in fact of ..... named in the annexed instrument, as a party thereto, and therein described as the party executing the same by his said attorney; and the said ..... acknowledged to me that he executed the same freely and voluntarily, as, and for the act and deed of the said ....., and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my private seal (having no seal of office) the day and year in this certificate first above written.

....., [L S.]
Justice of the peace.

SEC. 4. An acknowledgment of a conveyance which does not state that the person making the acknowledgment is either personally known, or proved to the officer to be the person who executed it, does not entitle the instrument to be recorded; and if recorded its record imparts no notice. 7 *Cal.* 161, 162.

SEC. 5. Where the officer taking an acknowledgment certifies that the parties "were known to him," and omits the word "personally," it is valid. 8 *Cal.* 87.

SEC. 6. The certificate of acknowledgment of a married woman to a deed must state that the contents of the deed were explained to her, otherwise it is defective, and will not pass her interest in the estate. 10 *Cal.* 436.

SEC. 7. Under our law, no presumption of knowledge, on the part of a married woman, of the contents of a deed arises from the fact of executing it. 10 *Cal.* 436.

SEC. 8. A justice of the peace can take the acknowledgment of the wife to a deed of the homestead. 13 *Cal.* 81.

SEC. 9. The recorder of the city of San Francisco is authorized by law to take acknowledgments of mortgages and conveyances. 8 *Cal.* 87.

CHAPTER XXII.

ACTIONS AGAINST STEAMERS, VESSELS AND BOATS.

	SECS.
JURISDICTION OF THE COURTS..	1
FOR WHAT STEAMERS, VESSELS AND BOATS LIABLE.....	2–3
ACTIONS MAY BE BROUGHT DIRECTLY AGAINST STEAMERS, VESSELS AND BOATS.....	4
THE COMPLAINT.....	5
SERVICE OF SUMMONS.....	6–7
THE LIEN.....	8
ATTACHMENT MAY BE ISSUED...	10
THE UNDERTAKING BEFORE ISSUANCE OF ATTACHMENT...	10
FORM OF THE UNDERTAKING. See ATTACHMENT.	
CONTENTS OF WRIT OF ATTACHMENT.....	11
FORM OF THE WRIT. See ATTACHMENT.	
FORM OF UNDERTAKING TO PREVENT ATTACHMENT. See ATTACHMENT.	
DUTY OF THE CONSTABLE UPON DELIVERY OF THE WRIT...	12
RIGHTS OF THE OWNER, MASTER, AGENT OR CONSIGNEE.....	13
HOW PROCEEDINGS TO BE CONDUCTED	14
DISCHARGE OF ATTACHMENT AFTER APPEARANCE	15
FORM OF DISCHARGE. See ATTACHMENT.	
SALE UNDER EXECUTION.....	16
CLAIMS FOR WAGES.....	17–18
CONTENTS OF NOTICE OF SALE..	19
FORM OF NOTICE. See ATTACHMENT.	
APPEALS.....	20

Jurisdiction of the Courts.

SECTION 1. The sixth chapter of the practice act, providing for actions against steamers, vessels and boats, confers upon the district courts admiralty jurisdiction *pro tanto*, and the proceedings in such actions must be governed by the principles and forms of admiralty courts, except where otherwise controlled or directed by the act. The rule in regard to actions *in rem*, in both admiralty and common-law courts, gives exclusive jurisdiction, in a given case, to that tribunal which has acquired it by a judicial seizure of the thing; and such seizure has always been held essential to a proceeding *in rem*. Our statute, however, alters that rule. It makes the service of process upon a person standing in a particular relation to the thing equivalent to its seizure, for the purpose of conferring jurisdiction; and it necessarily follows that jurisdiction *in rem* may exist in several courts at the same time and over the same subject. There need,

however, be no conflict of jurisdiction. The court whose mesne or final process has made first actual seizure of the thing must have exclusive power over its disposal and the distribution of the fund arising therefrom. The judgments of other courts, where properly authenticated, and filed in the court having custody of the fund, must be regarded as complete adjudication of the subject matter of litigation which they disclose, and entitled to distribution according to their respective merits. This construction is totally independent of the provisions of section three hundred and twenty-nine of the act. That is intended to provide a summary mode of determining claims of a particular class which have not been adjudicated by a competent tribunal. *Averill* vs. *Steamer Hartford*, 2 Cal. 309, 310.

For What Steamers, Vessels and Boats, Liable.

SEC. 2. All steamers, vessels and boats, shall be liable:

1st. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents or consignees.

2d. For supplies furnished for their use, at the request of their respective owners, masters, agents or consignees.

3d. For materials furnished in their construction, repair or equipment.

4th. For their wharfage and anchorage within this state.

5th. For non-performance or mal-performance of any contract for the transportation of persons or property made by their respective owners, masters, agents or consignees.

6th. For injuries committed by them to persons or property. The said several causes of action shall constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and shall have preference over all other demands: *provided*, such lien shall only continue in force for the period of one year from the time the cause of action accrued. *Gen. Laws*, 5255, 5464.

SEC. 3. A contract, under the foregoing section, for the transportation of passengers from San Francisco to New York, is an entirely, whether the entire voyage is to be performed in one vessel or not; and a breach of such contract at any point, as leaving the passenger on the Isthmus,

renders the vessel liable. State courts have jurisdiction in such cases. *Ord* vs. *Steamer Uncle Sam*, 13 Cal. 369; *Warner and Wife* vs. *Steamer Uncle Sam*, 9 Cal. 697.

Actions May be Brought Directly Against Steamers, Vessels and Boats.

SEC. 4. Actions for demands arising upon any of the grounds specified in the preceding section, may be brought directly against such steamers, vessels or boats. *Gen. Laws*, 5256, 5464.

The Complaint.

SEC. 5. The complaint shall designate the steamer, vessel or boat, by name, and shall be verified by the oath of the plaintiff, or some one on his behalf. *Gen. Laws*, 5257, 5464.

Service of Summons.

SEC. 6. The summons attached to a certified copy of the complaint, may be served on the master, mate or any person, having charge of the steamer, vessel or boat, against which the action is brought. *Gen. Laws*, 5258, 5464.

SEC. 7. In an action against boats and vessels under the statute, the service of process in the manner prescribed by statute, is equivalent to an actual seizure. *Meiggs* vs. *Scannell*, 7 Cal. 405.

The Lien.

SEC. 8. It is not necessary that the vessel should be attached, in order to acquire a lien, as against subsequent purchasers. *Meiggs* vs. *Scannell*, 7 Cal. 405. In a case decided before the amendment of section three hundred and seventeen, the sixth subdivision of which did not contain the sentence in reference to liens, the supreme court say: "Under the statute, the lien attaches only when service is had in the suit." *Fisher* vs. *White et al.*, 8 Cal. 418. There is nothing in our statute expressly creating a lien; and, from the fact that there is no express provision to this effect, and the word *lien* is studiously omitted, and no *time* is limited within which proceedings should be commenced, and that a suit may be brought by the service of the summons, without attachment, it would seem to have been the intention of the legislature to make the lien attach when the liability was incurred. The intention of the act was to give

priority to the most diligent creditor, except claims for wages, which are preferred before all the others mentioned in the statute. *Fisher* vs. *White et al.*, 8 Cal. 423.

Attachment may be Issued.

SEC. 9. The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the steamer, vessel or boat, against which the action is brought, with its tackle, apparel and furniture, attached, as security for the satisfaction of any judgment that may be recovered therein. *Gen. Laws*, 5259, 5464.

The Undertaking before Issuance of Attachment.

SEC. 10. The justice shall issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect, that if judgment be rendered in favor of the steamer, vessel or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages which may be sustained by such steamer, vessel or boat, from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars when the attachment is issued against a steamer or vessel, or less than two hundred dollars when issued against a boat. The undertaking shall be accompanied by an affidavit of each of the sureties, that he is a resident and freeholder or householder of the county, and worth double the amount specified in the undertaking over and above all his just debts and liabilities. The justice shall file the undertaking and affidavits. *Gen. Laws*, 5260, 5464.

For form of undertaking see ATTACHMENT.

Contents of Writ of Attachment.

SEC. 11. The writ shall be directed to any constable of the county within which the steamer, vessel or boat, lies, and direct him to attach such steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in his custody until discharged by due course of law; unless the owner, master, agent or consignee, thereof, give him secu-

rity by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, which shall be specified in the writ, besides costs; in which case, to take such undertaking. *Gen. Laws*, 5261, 5464.

For form of writ, also undertaking to prevent attachment, see ATTACHMENT.

Duty of the Constable upon the Delivery of the Writ of Attachment.

SEC. 12. The constable to whom the writ is directed and delivered shall execute the same without delay, and shall, unless the undertaking mentioned in the last section be given, attach and keep in his custody the steamer, vessel or boat, named therein, with its tackle, apparel and furniture, until discharged by due course of law; but the constable shall not be authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel or boat, nor with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook or other persons, employed on board. *Gen. Laws*, 5262, 5464.

Rights of the Owner, Master, Agent or Consignee.

SEC. 13. The owner, master, agent or consignee, of the steamer, vessel or boat, against which the action is brought, may appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on the behalf of the plaintiff, and may require sureties to justify, as in actions against individuals upon bail or arrest. *Gen. Laws*, 5263, 5464.

How Proceedings to be Conducted.

SEC 14. All proceedings in actions under the provisions of this chapter shall be conducted in the same manner as in actions against individuals, except as otherwise herein provided; and in all proceedings subsequent to the complaint, the steamer, vessel or boat, may be designated as defendant. *Gen. Laws*, 5264, 5464.

Discharge of Attachment after Appearance.

SEC. 15. After the appearance to the action, of the owner, master, agent or consignee, the attachment may, on motion,

be discharged, in the same manner and on like terms and conditions as attachments in other cases, subject to the provisions of section three hundred and twenty-nine. *Gen. Laws*, 5265, 5464.

For form of order of discharge see ATTACHMENT.

Sale Under Execution.

SEC. 16. If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the constable shall sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and shall apply the proceeds of sale, as follows:

1st. When the action is brought for demands other than the wages of mariners, boatmen and others, employed in the service of the steamer, vessel or boat, sold, to the payment of the amount of such wages, as specified in the execution.

2d. To the payment of the judgment and costs, including his fees.

3d. He shall pay any balance remaining to the owner, master, agent or consignee, who may have appeared in the action; or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto. *Gen. Laws*, 5266, 5464.

Claims for Wages.

SEC. 17. Any mariner, boatman or other person, employed in the service of the steamer, vessel or boat, attached, who may wish to assert his claim for wages against the same, the attachments being issued for other demands than such wages, shall file an affidavit of his claim, setting forth the amount and the particular service rendered, with the justice; and thereafter no attachment shall be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next section, be covered thereby in addition to the other requirements; and any execution issued against such steamer, vessel or boat, upon judgment recovered thereafter, shall direct the application of the proceeds of any sale:

1st. To the payment of the amount of such claims filed, or the amount determined, as provided in the next section, which the justice shall insert in the writ.

2d. To the payment of the judgment and costs and constable's fees; and shall direct the payment of any balance to the owner, master, agent or consignee, who may have appeared in the action; but if no appearance by them be made therein, it shall direct a deposit of the balance in court. *Gen. Laws*, 5267, 5464.

SEC. 18. If the claim of the mariner, boatman or other person, filed with the justice, as provided in the last section, be not contested within five days after notice of the filing thereof by the owner, master, agent or consignee, of the steamer, vessel or boat, against which the claim is filed, it shall be deemed admitted; but if contested, the justice shall indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest; and shall immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the justice or referee may be received by the county judge either in term or vacation, immediately after the same is given, and the judgment of the county judge shall be final. On the review, the county judge may use the minutes of the proofs taken by the justice or referee, or may take the proofs anew. *Gen. Laws*, 5268, 5464.

Contents of Notice of Sale.

SEC. 19. The notice of sale published by the constable shall contain a statement of the measurement and tonnage of the steamer, vessel or boat, and a general description of her condition. *Gen. Laws*, 5269, 5464.

Appeals.

SEC. 20. From orders and judgments under this chapter, an appeal may be taken by the owner, master, agent or consignee, on the same terms and conditions as appeals in actions against individuals. *Gen. Laws*, 5270, 5464.

CHAPTER XXIII.

ADJOURNMENT.

	SECS.		SECS.
ADJOURNMENT DISCRETIONARY WITH THE COURT	1	ADJOURNMENT WHEN A TRIAL BY JURY IS DEMANDED	16
BY CONSENT	2– 4	WHEN JURY HAS BEEN SUMMONED	17
FOR A PERIOD NOT EXCEEDING TEN DAYS	5– 7	ON JUSTICE'S OWN MOTION	18–19
FOUR MONTHS	8	WHEN JUSTICE IS OFFICIALLY OCCUPIED	20
GROUNDS FOR ADJOURNMENT	9–11	ORDERING CASE TO STAND OPEN FOR TRIAL	21–24
AFFIDAVIT FOR ADJOURNMENT	12	STAGE OF PROCEEDINGS AT WHICH ADJOURNMENT MAY BE HAD	25–27
FORM OF THE AFFIDAVIT	13	WHEN IMPROPER ADJOURNMENTS WAIVED	28–29
UNDERTAKING ON ADJOURNMENT FOR A PERIOD NOT EXCEEDING FOUR MONTHS	14		
FORM OF THE UNDERTAKING	15		

Adjournment Discretionary with the Court.

SECTION 1. The granting or refusing of a continuance rests in the sound discretion of the court. *Musgrove* vs. *Perkins*, 9 Cal. 212.

Adjournment by Consent.

SEC. 2. The trial may be adjourned by consent. *Gen. Laws*, 5514.

SEC. 3. Where a case is adjourned to no certain day, but the time is left to the agreement of counsel, the justice has no authority afterwards to appoint a time and place for the trial, without the consent of both parties. If the defendant refuse to agree to any time, the plaintiff must commence his action anew. 4 *Zab.* (N. J.) 419.

SEC. 4. A justice cannot adjourn a cause on an adjourned day, in the absence of the defendant, and without his consent, and then hear the cause in his absence and without notice. 2 *Green*, (N. J.) 590.

Adjournment for a Period not Exceeding Ten Days.

SEC. 5. The trial may be adjourned by consent, or upon application of either party, without the consent of the other, for a period not exceeding ten days (except as provided in the next section), as follows:

1st. The party asking the adjournment shall, if required by his adversary, prove, by his own oath or otherwise, that he cannot for want of material testimony, which he expects to procure, safely proceed to trial, and shall show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so.

2d. That the party asking the adjournment shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party who is in attendance, be then taken by deposition before the justice, which shall accordingly be done, and the testimony so taken may be read on the trial, with the same effect and subject to the same objections as if the witness were produced; but such objections shall be made at the time of taking the deposition.

3d. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed. *Pr. Act*, 583; *Gen. Laws*, 5514.

SEC. 6. A justice cannot postpone a cause indefinitely. 3 *Hill*, 499.

SEC. 7. Neither can he adjourn a cause for a longer period than is allowed by statute, without express consent of both parties. And having adjourned ten days by consent, he was held to have lost jurisdiction by an adjournment, without consent, for one day more. 2 *E. D. Smith*, (N. Y.) 339.

Adjournment for a Period not Exceeding Four Months.

SEC. 8. An adjournment may be had, either at the time of joining issue or at any subsequent time to which the case may stand adjourned, on application of either party, for a period longer than ten days, but not to exceed four months, from the time of the return of the summons, upon proof by the oath of the party or otherwise, to the satisfaction of the justice, that such party cannot be ready for trial before the time to which he desires an adjournment, for

want of material evidence, particularly describing it, and that the delay has not been made necessary by any act of negligence on his part since the action was commenced; that he has used due diligence to procure the evidence, and has been unable to do so; and that he expects to procure the evidence at the time stated by him; *provided*, that if the adverse party admit that such evidence would be given, and consent that it may be considered as given on the trial, or offered, or overruled as improper, the adjournment shall not be had. *Gen. Laws*, 5515.

Grounds for Adjournment.

SEC. 9. A refusal to grant a continuance for the absence of witnesses or counsel, under circumstances showing that the party or his counsel was surprised as to the time or place of holding court, is error. *Ross* vs. *Austill*, 2 Cal. 192.

SEC. 10. A mistaken advice of counsel to his client not to prepare for trial is no ground for a continuance. Mistakes in matters of law are frequently made by counsel, and if parties could be relieved by simple allegations of having acted, or neglected to act, in consequence of advice predicated upon such mistakes, there would be no end of the cases in which such excuses would be offered. *Musgrove* vs. *Perkins*, 9 Cal. 212.

SEC. 11. The absence of evidence is no cause for a continuance, unless reasonable diligence has been used to procure it. The party must have resorted to the proper legal means for that purpose, or he must show to the satisfaction of the court that a resort to such means would have been unavailing. Where the evidence is in his own possession, its absence is not excused by showing that through inadvertence he is unable to produce it. 17 *Cal.* 128.

The Affidavit for Adjournment.

SEC. 12. An affidavit for continuance, on the ground of the absence of a witness, must aver, that the party cannot, to his knowledge, prove the same facts by any other witness (*Pierce* vs. *Paine et al.*, 14 Cal. 419; *People* vs. *Gaunt*, 23 Cal. 156); that the testimony wanted is not merely cumulative, that such application is not made for delay,

and the character of diligence used in trying to obtain the attendance of the witness. The allegation that a party has used all the diligence in his power is not sufficient; it should be shown to the court of what such diligence consisted, whether by exhausting the process of the court or otherwise. *People* vs. *Thompson*, 4 Cal. 241; *Kuhland* vs. *Sedgwick*, 17 Cal. 128.

Form of the Affidavit for Adjournment.

SEC. 13. The following is a form of an affidavit for adjournment:

In the justice's court in and for ..... township, county of ....., state of .....

....,
plaintiff,
against
....,
defendant.

Personally appeared before me, the defendant above-named, who being by me first duly sworn, deposes and says, that .... is a material witness for him in his defense, that he can prove by said .... [if required, state what you can prove by him] facts which he has made known to his counsel, and is by his said counsel advised that said facts are material, and that he cannot go safely to trial without proving the same; that he can prove said facts by said witness, and that he cannot, to his knowledge, prove the same by any other witness; that the testimony of said witness will not be merely cumulative, that he has procured the issuance of a subpena and directed the same to said ...., and did place the same in the hands of .... constable of said township, and directed said constable where, according to the best knowledge and belief of said affiant, said witness could be found; that said constable has made return of said subpena, saying that he has made diligent search for said ...., and that he cannot be found, that since the return of said constable he has made inquiry of persons likely to know the whereabouts of said ...., and has been informed that said witness left this county for a short time on business and that he will not return within the jurisdiction of this court until about the .... day of ..... [whatever cause exists for his non-service you should state it, the object being to show the court what diligence you have used]; that he can procure the attendance of said witness within the next ten days, and that this application is not made for delay but that he may have justice.

Subscribed and sworn to before me, this ..... day of ....., 187 ..

....
Justice of the peace.

The Undertaking on Adjournment for a Period not Exceeding Four Months.

SEC. 14. No adjournment shall be granted for a period longer than ten days, upon the application of either party,

except upon condition that such party file an undertaking, with sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying. *Pr. Act*, 585; *Gen. Laws*, 5516.

Form of an Undertaking on Adjournment for a Period not Exceeding Four Months.

SEC. 15. The following is a form of an undertaking on adjournment for a period not exceeding four months:

In the justice's court in and for ..... township, county of ....., state of .....

....,
plaintiff,
against
....,
defendant.

Whereas, the above-named defendant has demanded of said court, upon his affidavit presented thereto, an adjournment of the trial of said cause for a longer period than ten days and not exceeding four months which application has been granted. Now, therefore, we the undersigned residents of said county, in consideration of the premises, do hereby jointly and severally promise that we will pay to the above-named plaintiff the amount of any judgment which he may recover against the said defendant.

In witness whereof, we hereunto subscribe our names.

.... [L.S.]
.... [L.S.]

Adjournment when a Trial by Jury is Demanded.

SEC. 16. When a trial by jury is demanded, the trial of the case shall be adjourned, until a time and place fixed for the return of the jury. If neither party desire an adjournment, the time and place shall be determined by the justice, and shall be on the same day, or within the next two days. *Gen. Laws*, 5518.

Adjournment when a Jury has been Summoned.

SEC. 17. A justice has a discretionary power to continue a case for a week or more, and may require the same jury to attend again, though the better course might be, to summon a new jury at the continued term, as is done in the county court. 25 *Vt.* (2 Deane's) 93.

Adjournment on Justice's own Motion.

SEC. 18. A justice may make a second adjournment of a

cause, of his own motion, without affidavit (4 *Harring.* 92, 313), but the record should show the cause for such adjournment. 4 *Harring.* 92, 352.

SEC. 19. He cannot adjourn a cause on his own motion and for his own convenience, for a longer time than he has power to do for the convenience of the parties; whether he has power to adjourn a cause for any time for his own convenience, *quære.* 1 *Harring.* 127.

Adjournment when Justice is Officially Occupied.

SEC 20. If a justice adjourns a cause till one o'clock P. M., and is occupied officially till five P.M., he can resume the cause though the defendant be absent. 10 *Wend.* 102.

Ordering Case to Stand Open for Trial.

SEC. 21. A case being properly in court, it is competent for the justice to order the case to stand open for trial, for a reasonable time.

SEC. 22. It is his duty to see that the defendant has his day in court, and an opportunity to make his defense; and where the justice ordered the case to stand open for trial, with the understanding that if the defendant appeared by three o'clock, or in a reasonable time (one o'clock being the time set in the writ), the right of appearing and defending the suit should be secured to him, and the justice returned about the hour of four, and within the time in which he had the power, by statute, to vacate any record of default, etc., and then notified the counsel of the defendant that the case was open for trial, if they desired to make any defense, and requested him to appear and answer for that purpose, it was held, that this was a full compliance with the duty of the justice after the case was ordered to stand open. 24 *Vt.* (2 Deane's) 87.

SEC. 23. But a justice has no power to open a case for further hearing after the day of trial has passed, the case having been submitted by the plaintiff, and his witnesses having departed. 2 *E. D. Smith* (N. Y.) 37.

SEC. 24. Neither can he hold a cause open for any number of days from the return of the summons, where the defendant does not appear and there is no issue joined,

although he might, perhaps, adjourn the cause to a day certain; and, where a cause was held open four days and then tried, the defendant not appearing, the proceedings were adjudged erroneous. 4 *Denio*, 160.

Stage of Proceedings at which Adjournment may be had.

SEC. 25. A justice may adjourn his court to any part of the town in which its original place of sitting was fixed. He may adjourn after a jury has been drawn which the officer is proceeding to summon; the statute confines the power to no particular stage of the proceedings. 6 *Vt.* 60.

SEC. 26. But he has no power to act in the case or continue it, before the time at which the writ is returnable. 6 *Shep.* 23.

SEC. 27. Nor where he has ordered a continuance of an action can he order a further continuance prior to the day appointed. 5 *Shep.* 413.

When Improper Adjournments Waived.

SEC. 28. If a justice improperly adjourn a cause and the parties appear on the day of adjournment, they waive the irregularity. 3 *Hill*, 180.

SEC. 29. But an appearance by the defendant at the time and place for the purpose of protesting against such continuance, is no waiver of the illegality. 6 *Shep.* 23.

CHAPTER XXIV.

AMENDMENTS.

SECTION 1. The pleadings may be amended at any time before the trial, to supply a deficiency or omission, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may, also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party, to

be fixed by the court, not exceeding twenty dollars; but such payment shall not be required unless an adjournment is made necessary by the amendment; nor shall an amendment be allowed after a witness is sworn on the trial, when an adjournment thereby will be made necessary. *Pr. Act*, 580.

SEC. 2. The object of the statute in reference to amendments is unquestionably the furtherance of justice. So far as that goes, courts ought to be disposed to treat such applications favorably. In most instances it is a matter of course that they should be granted. But courts have not been inclined to look very kindly upon statutes of limitation, except where they were used as the instruments of justice, and not strategy. For example: there is a wide distinction between the protection of minor heirs by such means, and the facility on the other hand afforded to the wary and skillful of escaping from the payment of an equitable demand. In the first case the whole scope, force and effect, should be given to the law; in the latter, it would only be reluctantly allowed its course for the sole end of maintaining it as a general rule of conduct. The single evil of that occasion would be less pernicious than the violation of the law for the purpose of doing justice. *Cooke* vs. *Spears*, 2 Cal. 411.

SEC. 3. It is always in the power of the court to allow an amendment to the complaint, so it does not affect the substantial rights of the parties. 9 *Cal.* 58. The court may allow, after the close of plaintiff's evidence, the complaint to be amended by adding the name of another party plaintiff, if it does not affect the substantial rights of the parties. *Polk et al.* vs. *Coffin & Swain*, 9 Cal. 56.

SEC. 4. Under the liberal provisions of our practice act, courts should allow amendments with great liberality at any stage of proceedings before trial, when required, seeing that no injurious delays are occasioned, and that the matter of the amendment is essential to a fair trial on the legal merits of the case. *McMillan* vs. *Dana et al.*, 18 Cal. 348, 349.

SEC. 5. In an action upon a contract for beef furnished the defendant, the complaint alleged that the beef was furnished to the defendant, but did not allege that it was furnished "at his request." The defendant moved to dismiss

the case on the ground that the complaint did not set forth any cause of action. The plaintiff thereupon moved for leave to amend his complaint. The court denied the motion of the plaintiff to amend, and granted the motion of the defendant, and dismissed the case: *Held*, that the court erred in refusing to allow the plaintiff to amend his complaint, and in dismissing the suit. Amendments should be readily allowed whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in justices' courts. *Butler* vs. *King*, 10 Cal. 342, 343.

SEC. 6. It would be carrying the power and discretion of the court to an extreme point to permit a party, after summoning his adversary to appear and defend an action *ex contractu*, to amend his declaration so as to change the proceeding into an action *ex delicto*. *Ramirez* vs. *Murray*, 5 Cal. 224.

SEC. 7. *Amendment of Pleading.*—If evidence is objected to because the defense under which it is offered is defectively pleaded, the court should allow the pleading to be amended. *Carpentier* vs. *Small*, 35 Cal. 346.

SEC. 8. An amended answer supersedes the original and destroys its effects as a pleading. *Jones* vs. *Frost*, 28 Cal. 246.

SEC. 9. Fraud discovered after suit brought will entitle the party to amend his action so as to include it. *Truebody* vs. *Jacobson*, 2 Cal. 269; *Matoon* vs. *Eder*, 6 Cal. 61.

SEC. 10. To subserve the purposes of justice, courts should allow a garnishee to amend his answer whenever it appears that he committed a mistake, or had fallen into an error which could not reasonably have been avoided. *Smith* vs. *Brown*, 5 Cal. 118.

SEC. 11. The court below may allow a summons to be amended by inserting a notice of the cause of action, etc. 2 *Cal.* 193.

SEC. 12. If the discretion of courts in regard to allowing or refusing amendments, be abused or illegally exercised, an appellate court will interpose. *Cook* vs. *Spear*, 2 Cal. 409.

CHAPTER XXV.

APPEALS.

	SECS.		SECS.
FROM JUSTICE'S COURT, TO COUNTY COURT, RIGHT OF.	1–12	UNDERTAKING ON.....	33–47
NOTICE OF.....	13–19	JUSTIFICATION OF SURETIES....	48–51
STATEMENT ON.	20–32	FORMS.....	52

From Justice's Court to County Court, Right of.

SECTION 1. Judgments in all civil cases, rendered by justices', recorders' and mayors' courts, may be reviewed by the county court. When the appeal is taken on questions of law alone, it shall be heard on a statement of the case prepared as prescribed in section twenty of this chapter. When the appeal is taken on questions of fact, or on questions of both law and fact, the action shall be tried anew in the county court, and either party may, on such trial, demand a jury. Upon an appeal heard upon a statement of the case, the county court may review all orders affecting the judgment appealed from, and may set aside or confirm or modify, any or all of the proceedings subsequent to and dependent upon said judgment, and may, if necessary and proper, order a new trial. When the action is tried anew on appeal, the trial shall be conducted in all respects as trials in the district court. The provisions of this act, as to changing the place of trial, and all the provisions as to trials in the district court, shall be applicable to trials on appeal in the county court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the county court, after notice, may order the appeal to be dismissed. Judgments rendered in the county court on appeal shall have the same force and effect, and be enforced in the same manner as judgments in actions commenced in the district court. *Gen. Laws*, 5305.

SEC. 2. By the provisions of section three hundred and sixty-six, there are two distinct classes of appeal from the judgments rendered by justices of the peace, recorders and mayors: 1st. When the appeal is taken on questions of

law alone. 2d. When taken on questions of fact, or on questions of both law and fact. When the appeal is taken on questions of law alone, the justice sends up a statement with a copy of his docket, and all motions filed by the parties during the trial, the notice of appeal and the undertaking on appeal. But when the appeal is on questions of fact, or of both law and fact, he sends up no statement. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. The object which was intended to be accomplished by the act in distinguishing between the two classes of appeals, was to save costs in the appellate court, in certain cases. As the same laws governing the general transactions of business life must be applied in justices' courts as well as in others, many cases must arise where the dispute is not about facts, but simply about questions of law alone. If the act required a trial anew in these cases, it would add greatly to the costs in the county court. As the appellant is required in the statement to give the grounds he intends to rely on, both parties come before the court without witnesses, and only prepared to discuss the questions of law. *People* vs. *Freelon*, 8 Cal. 518.

SEC. 3. On appeal from a justice's court to the county court, on questions of law alone, if a new trial be ordered, it should take place in the county court. 8 *Cal.* 518.

SEC. 4. Any party dissatisfied with a judgment rendered in a justice's court, may appeal therefrom to the county court of the county, any time within thirty days after the rendition of the judgment. The appeal shall be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party. The notice shall state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both. *Gen. Laws*, 5555.

SEC. 5. Where the appellant dies on the same day that the judgment is rendered, there is no authority for prosecuting the cause in the name of the deceased; but all proceedings ought to be stayed until, by suggestion, his execu-

tor or administrator is made a party. *Sanchez* vs. *Roach*, 5 Cal. 248.

SEC. 6. No appeal can be taken to the county court from a justice's judgment rendered by default. *People* vs. *County Court of El Dorado*, 10 Cal. 19; *Funkenstein* vs. *Etgutter*, 11 Cal. 328.

SEC. 7. In Maine, where an action commenced before a justice has been defaulted, no appeal lies. 28 *Maine* (15 Shep.) 102. And the plaintiff is entitled to costs of the appeal. 31 *Maine* (1 Red.) 557.

SEC. 8. In California, a plaintiff cannot appeal from a judgment of nonsuit rendered on his own motion. *Sleeper* vs. *Kelly*, 22 Cal. 456.

SEC. 9. In Illinois, one of several defendants may appeal from a judgment of a justice, though the others refuse to join. 2 *Scam.* 46.

SEC. 10. So in Wisconsin, if a justice renders a judgment against two or more parties, one or either of them may appeal without joining the others. 5 *Wis.* 156. And an appeal by one or more co-defendants, against whom judgment has been rendered, stops all further proceedings there and transfers the entire case to the appellate court. 2 *Wis.* 284.

SEC. 11. In Missouri, the absence of the justice from home during the ten days after trial, may be a good excuse for not appealing, but it must appear that he was absent during the whole of the ten days. 5 *Mo.* 386.

SEC. 12. In Iowa, a written agreement to abide by the decision of a justice as final, is binding and precludes an appeal. 8 *Iowa*, 332.

Notice of.

SEC. 13. In California, the filing of a notice of appeal must precede the filing of the undertaking on appeal. Until an appeal is taken there is nothing to give effect to the undertaking. *Buckholder* vs. *Byers*, 10 Cal. 481.

SEC. 14. Where the object of notice of appeal to the county court is accomplished, it is immaterial whether the notice is given or not. Where both parties appear, no notice whatever is necessary to be shown. *McLeran* vs. *Shartzer*, 5 Cal. 70.

SEC. 15. A judgment was rendered for plaintiff in a

justice's court, on July 2d, 1857. Notice of appeal was handed to the justice on the sixth of July, and on the same day notice of appeal was served on the attorney of plaintiff. *This* notice described the parties to the suit and the justice before whom it was obtained, but stated that the appeal was taken from a judgment rendered on the fourth day of July. The notice given to the justice described the judgment correctly. The justice sent up a copy of his docket and the papers, except the notice. The appeal was taken on questions both of law and fact. When the case was called in the county court, both parties appeared, and each asked liberty to make a motion. The plaintiff's counsel was allowed to make his motion first, and moved to dismiss the appeal and affirm the judgment of the justice, for two reasons: First, there was no notice of appeal on file; second, there was no notice of appeal served on defendant. The mistake in the date of the judgment, as stated in the notice of appeal which was served on respondent, was not material. The notice was sufficient. It was the duty of the justice to send up the notice of appeal received by him. The county court should have given the appellant the opportunity to move for an order compelling the justice to send it up. The order of the county court dismissing the appeal and affirming the judgment of the justice is reversed, and that court will proceed to try the case anew. 9 *Cal.* 18.

SEC. 16. The statute concerning appeals from justices' courts provides that "an appeal may be taken by filing a notice with the justice and serving it upon the adverse party." There is nothing in this statute which forbids service of notice of appeal upon the attorney, if one appeared, for the party appealing on the trial. The general law regulating appeals, which provides that notice may be served on the party or his attorney, must govern cases arising in justices' courts. *Welton* vs. *Garibardi*, 6 Cal. 245.

SEC. 17. Where a judgment rendered before a justice is appealed from, and the parties by consent withdraw the appeal, the judgment is restored. 4 *Jones' Law* (N. C.) 508.

SEC. 18. A party appealed from the judgment of a justice, and afterwards countermanded the appeal: *Held*, that the judgment was vacated by the appeal, but that being

countermanded it was restored to its former force. *Busbee's Law* (N. C.) 392.

SEC. 19. After an appeal is taken by the defendant, the justice has no authority, even before he returns the papers, to receive the amount he adjudged to the plaintiff. 11 *Ala.* 166.

Statement on.

SEC. 20. When a party appeals to the county court on questions of law alone he shall, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the justice. The statement shall contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments shall be settled by the justice, and if no amendments be filed, the original statement shall be adopted. The statement thus adopted or as settled by the justice, with a copy of the docket of the justice, and all motions filed with him by the parties during the trial and the notice of appeal, shall be used on the hearing of the appeal before the county court. *Pr. Act*, Sec. 625.

SEC. 21. When a party appeals to the county court on questions of fact, or on questions of both law and fact, no statement need be made, but the action shall be tried anew in the county court. *Pr. Act*, Sec. 626.

SEC. 22. In a statement for a new trial the evidence may be simply referred to, and need not be contained in the statement itself. It is not so in a statement on appeal, in which the evidence, if relied upon, must be set out. If the statement on appeal does not contain the evidence, or so much at least as may be necessary, then the appellant cannot rely upon any ground depending upon the testimony. *Dickinson* vs. *Van Horn*, 9 Cal. 211.

SEC. 23. Instruments are sometimes admissible for one purpose and inadmissible for another; and, when objected to, the grounds of objection should be stated; and in preparing the record for appeal so much of the evidence should

be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they cannot be regarded. *Provost* vs. *Piper et al.*, 9 Cal. 553.

SEC. 24. Upon receiving the notice of appeal and on payment of the fees of the justice and filing an undertaking as required in section thirty-three, the justice shall, within five days, transmit to the clerk of the county court, if the appeal be on question of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal and the undertaking filed, and the justice may be compelled by the county court, by an order entered, upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same; a certified copy of such order may be served on the justice by the party or his attorney. In the county court, either party shall have the benefit of all legal objections made in the justice's court. *Pr. Act*, 627; *Gen. Laws*, 5558. The filing of a notice of appeal and undertaking on appeal in a justice's court, after the rendition of a verdict by the jury, but before the entry of judgment thereon, does not deprive the justice of authority to enter up judgment on the verdict. *Fugit* vs. *Cox*, 2 Nevada, 399.

SEC. 25. A justice not being the successor of another justice, but having in his possession the docket of another justice, in the cases provided for, cannot grant an appeal from a judgment on such docket, and certify a transcript in the case, until he shall have previously transferred the judgment to his own docket. 3 *Ind.* 112.

SEC. 26. On an appeal from the judgment of a justice in Indiana, the cause of action filed with the justice need not be copied or referred to in the justice's transcript. 6 *Blackf.* 116.

SEC. 27. On appeal, it must appear from the transcript of the record that the plaintiff below had filed a statement of his demand, or some note or other writing relied on as the cause of action; otherwise, the action will be dismissed. 4 *Blackf.* 12. But any statement, however short or infor-

mal, will answer the purpose, provided enough is shown to bar another action for the same demand. 4 *Blackf.* 13.

SEC. 28. On appeal from a justice's to a county court, the record not showing that notice of appeal had been served on the adverse party, appellant may prove by his affidavit that such notice was in fact served. *Mendioca* vs. *Orr*, 16 Cal. 368.

SEC. 29. One of the conditions upon which an appeal is allowed is the payment of the costs of the action. *McDermott* vs. *Douglass*, 5 Cal. 89.

SEC. 30. Where the county court dismissed the appeal of the defendant from the judgment of a justice of the peace, on the ground that the fees of the justice had not been paid, and refused to allow the appellant in that court to pay the fees, such as the court might direct, to save dismissal of the appeal: *Held*, that a justice of the peace may refuse to send up the transcript of a cause tried by him, unless all his legal fees be first paid by the appellant. But if he choose to waive his right and file the papers, the fact that his fees have not been paid is no ground for dismissing the appeal. *Bray* vs. *Redman*, 6 Cal. 287.

SEC. 31. An offer to pay *when the papers are made out*, is not sufficient to constitute a tender of the fees. The appellant must tender to the justice the amount of his fees, unconditionally. If the justice refuses to state the exact amount, then the appellant should offer to deposit with him such amount as he may demand, as surety for the fees, when ascertained. If an excessive deposit be demanded, the appellant should tender the amount he may judge sufficient; but he must be careful to tender an amount equal to the fees; otherwise, his tender will not be good. The justice is not bound first to make out the papers and then rely upon his fees being afterwards paid; he is not bound to credit the appellant. *People* vs. *Hamilton et al.*, 9 Cal. 572.

SEC. 32. On appeal from the judgment of a justice, the certificate of the justice to the transcript of the record, that "the above is a transcript of a judgment on my docket," though not strictly technical, is sufficient. 5 *Eng.* 249.

Undertaking on.

SEC. 33. An appeal from a justice's court shall not be effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and shall be conditioned, when the action is for the recovery of money, that appellant will pay the amount of the judgment appealed from and all costs if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the said action in the county court. When the action is for the recovery of specific personal property, the undertaking shall be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the county court, and will obey any order made by the court therein. *Pr. Act*, 628; *Gen. Laws*, 5559.

SEC. 34. No undertaking on appeal is necessary when the appeal is taken by the county (act concerning appeals, 1856). The board of supervisors represent the county in legal proceedings. *People* vs. *Board of Supervisors of Marin Co.*, 10 Cal. 344.

SEC. 35. Where the people of the state are appellants it is not necessary to file the usual undertaking on appeal. A state cannot be denied a hearing in her own courts because no bond has been filed for costs; besides, a fund has been provided by law for such cases, so that the respondent has ample indemnity. *People* vs. *Clingan*, 5 Cal. 391.

SEC. 36. The undertaking on appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. He is already bound by the judgment, and no purpose could be served by his

joining with the sureties. *Curtis* vs. *Richards et al.*, 9 Cal. 38.

SEC. 37. In an undertaking on appeal the names of the sureties need not appear in the body of the paper. All the use of this recital would be to show who executed the paper, and the signatures sufficiently indicate this fact. *Dore* vs. *Covey*, 13 Cal. 507.

SEC. 38. Where an instrument purporting to be a bond on appeal contains words of obligation, and has a scroll (L.S.) opposite the name of one of the signers, and the paper is executed by both, who contemporaneously verify the instrument by affidavit as their bond, it is enough to make it the deed of both. *Caulfield* vs. *Bates*, 13 Cal. 608.

SEC. 39. Where the bond is more favorable to the appellee than the statute requires, he cannot complain that the statute has not been followed. *Dore* vs. *Covey*, 13 Cal. 509.

SEC. 40. Residence of the sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions, and non-compliance with them, intended for the benefit of the respondent, does not vitiate the undertaking. *Dore* vs. *Covey*, 13 Cal. 502.

SEC. 41. An appeal bond will be so construed as to carry out the obvious intention of the parties. To support the condition of a bond, the court will transpose or reject insensible words, and construe it according to the obvious intent of the parties. There are many cases on the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties. Where the name of the obligor of the bond was inserted in the condition, instead of that of the obligee, it was held not material, as it was a mistake of such a character as not to affect the obligation of the bond, and was explained by its whole tenor and effect. *Swain* vs. *Graves*, 8 Cal. 551.

SEC. 42. Action to recover a mining claim by plaintiffs before a justice. Judgment for defendant for costs. Plaintiffs appeal to the county court. Defendant moves for a dismissal of the appeal, on the ground that the undertaking of plaintiffs is insufficient. Plaintiffs then offer to file a

good one. Afterwards the court refuses permission, and enters judgment of dismissal, from which plaintiffs appeal. The plaintiffs having offered to amend the bond before the motion to dismiss was determined, they should have been permitted to do so. *Cunningham et al.* vs. *Hopkins*, 8 Cal. 33.

SEC. 43. In the case of *Coulter* vs. *Stark* (7 Cal. 244), the following points were decided:

1st. When a justice errs in the exercise of jurisdiction, and not by assuming jurisdiction, the writ of *certiorari* is not the proper remedy.

2d. A justice of the peace may grant appeals, and may grant a stay of proceedings thereon.

3d. Where the appeal is taken in good faith, the appellate court will always permit a new undertaking to be filed, when the original is defective.

4th. Service of a notice of appeal upon the opposite attorney is always sufficient.

SEC. 44. In the supreme court, the point was raised that the county court had no jurisdiction, because there was no appeal bond, as required by the statute, to effect an appeal from justices of the peace to that court. The court say: This objection was not made in the court below, and it comes here too late. If it had been made in proper time before the county court, it would have been the duty of the presiding judge to hear the excuse of the party failing to produce it, and if sufficient, to have allowed him then to file a bond. *Howard et al.* vs. *Harmon*, 5 Cal. 78, 79.

SEC. 45. An appeal bond was filed with a justice and the proper affidavit of the two sureties was made before him. The bond was not marked "approved," by the justice, but was received by him without objection at the time. On the next day the justice indorsed upon the bond "not approved": *Held*, the justice should have rejected the bond, promptly. Under the circumstances the bond must be considered as approved. *People* vs. *Hamilton et al.*, 9 Cal. 572.

SEC. 46. An undertaking on appeal, conditioned for the payment of what the judgment creditor has no legal right to receive, is not, as to such creditor, binding upon the sureties. *Whiting* vs. *Allen et al.*, 21 Cal. 233.

SEC. 47. Where in a action on an appeal bond, conditioned to pay the judgment appealed from if the same should be affirmed by the appellate court, it appeared that the judgment appealed from was reversed, with directions to enter a different judgment: *Held*, that the conditions of such bond were not broken, and that no action would lie thereon. *Chase* vs. *Ries et al.*, 10 Cal. 517.

Justification of Sureties.

SEC. 48. The undertaking shall be accompanied by the affidavits of the sureties, that they are residents of the county, and are each worth the amount specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; or the bond shall be executed by a sufficient number of sureties who can justify, in the aggregate, to an amount equal to double the amount specified in the bond, or a deposit of the amount of the judgment, including all costs appealed from, or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice. And such deposit shall be equivalent to the filing of the undertaking in this act mentioned; and in such cases the justice shall transmit the money to the clerk of the county court, to be by him paid out on the order of the court. The adverse party may, however, except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no such undertaking had been given. *Pr. Act*, 628; *Gen. Laws*, 5559.

SEC. 49. Where a party gave notice of the justification of the sureties on an undertaking before the clerk of the court, on a day named, between the hours of ten A.M. and five P.M. of that day, and the sureties appeared upon such notice soon after ten of that day: *Held*, that the clerk acted properly in refusing to take their justification, the opposite party being absent until the last hour stated in the notice. The defendant should have designated an hour at which he

would have been present with his sureties, and he could not by his failure to do so compel the attendance of the opposite party the entire day in waiting for his appearance. *Lower* vs. *Knox*, 10 Cal. 480, 481.

SEC. 50. A motion is made in this case to dismiss the appeal. The notice of appeal was filed on the eighteenth of April, 1860. An undertaking was filed on the same day, and on the twentieth of April a notice was served excepting to the sufficiency of the sureties. A notice was thereupon given that on the twenty-fifth of the same month the sureties would justify before the county judge of Sacramento county. Certain orders were afterwards made extending the time of justification to the first of May. It was necessary that the sureties should justify within five days after the notice of exception, and the failure to do so rendered the appeal a nullity. The statute provides that upon a failure to justify within the time limited, the appeal shall be regarded as if no undertaking had been given. The orders extending the time were in contravention of this provision, and were therefore inoperative. The statute is peremptory in its terms, and the consequence of a violation is that the party loses the benefit of his appeal. See *Elliott* vs. *Chapman* and *Shaw* vs. *Randall* (April T. 1860). "It has been repeatedly held," says Sedgwick, "that courts have no dispensing power, even in matters of practice, when the legislature has spoken. Thus, where a statute declares that a judge at chambers may direct a new trial, if application be made within ten days after judgment, it has been said that he can no more enlarge the time than he can legislate in any other matter. When a statute fixes the time within which an act must be done, the courts have no power to enlarge it, although it relates to a mere question of practice. So, where an appeal to be valid, must be made within ten days, it is void if taken on the eleventh." *Sedg. on Con.* 322. It follows that the motion to dismiss must be granted, but the appellant is not precluded from the right to prosecute another appeal. 17 *Cal.* 122.

SEC. 51. If an execution be issued on the filing of the undertaking staying all proceedings, the justice shall, by order, direct the officer to stay all proceedings on the same.

Such officer shall, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof, as may be necessary to pay the same. *Pr. Act*, 629; *Gen. Laws*, 5560.

SEC. 52. The following is a form of notice of appeal:

Notice of Appeal—Civil Cases—Form No. .....

In the justice's court of ..... township, in the ....., county of ....., state of..... .

...., plaintiff,
against
...., defendant.

You will please take notice, that the defendant in the above entitled action hereby appeals to the county court of ....., county of ....., from the judgment therein made and entered in the said justice's court, on the .... day of ...., A.D. 18.., in favor of said plaintiff, and against said defendant, and from the whole of said judgment. This appeal is taken on questions of both law and fact [or, "on questions of law"].

Dated ...., A.D. 18..

Yours, etc.

....,
Attorney for appellant.

To the justice of said justice's court and ...., esq., attorney for respondent.

Due service of the within notice is hereby acknowledged .... .., 18..

....,
Attorney for respondent.

Subscribed and sworn to before me, this .... day of ....., A.D. 18..

....,
Justice of the peace .... township.

Appeal Bond.

In the justice's court of the ..... township, in the county of ....., state of .....

Know all men by these presents: That we, ..., principal, and .... and ...., sureties, are held and firmly bound unto .... in the sum of .... dollars, lawful money of the United States of America, to be paid to the said ...., his executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this .... day of ....., A.D. 18...

The condition of the above undertaking is such, that whereas the said .... obtained a judgment against the said ...., before

...., esq., justice of the peace of the .... township, in the county of ....., state of ....., on the .... day of ....., A.D. 18.., for the sum .... dollars damages, and .... dollars costs; and whereas, the above bounden .... is desirous of appealing from the decision of said justice to the county court of the said county of ....., and a stay of proceedings is claimed. Now, if the above bounden .... shall well and truly pay, or cause to be paid, the amount of the said judgment and all costs, and obey any order the said county court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment and all costs that may be recovered against the said appellant, in the said county court, and obey any order the said court may make therein, then this obligation to be null and void; otherwise to remain in full force and virtue.

.... [L.S.]
.... [L.S.]
.... [L.S.]

Justifiqation of Sureties.

State of .....
City and County of ..... } ss.

.... and ...., the sureties in the within undertaking, being duly sworn, say, each for himself, and not one for the other, that he is a resident of said city and county of ....., and that he is a [house or freeholder] within the same, and is worth the amount specified in the within undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

....,
....

Subscribed and sworn to before me, this .... day of ....., A.D. 18..

....,
Justice of the peace.

CHAPTER XXVI.

APPEARANCE.

	SECS.		SECS.
DEFENDANT'S APPEARANCE, ETC.	1– 3	FAILURE OF ONLY SOME OF DEFENDANTS TO APPEAR.....	8– 9
FORM OF NOTICE.....	4	FAILURE OF EITHER PARTY TO APPEAR.....	10–11
DEFENDANT'S DEFAULT.....	5	APPEARANCE BY ATTORNEY.....	12–14
FORM OF ENTRY OF DEFAULT...	6		
FAILURE OF ALL DEFENDANTS TO APPEAR.....	7		

Defendant's Appearance and Notice thereof.

SECTION 1. The defendant may appear in the action by demurrer or answer at any time after service of summons upon him, and shall notify the plaintiff, by written notice, of such appearance. *Stats.* 1867–1868, 552.

SEC. 2. A party ought not to be allowed the benefit of any proceeding, unless he also assumes the responsibility of it. His appearance for one purpose is a good appearance to the action. 4 *Cal.* 306.

SEC. 3. But an appearance merely for the purpose of asking an adjournment is not an appearance to the action, and where a judgment is rendered against the defendant in such case, he may bring a *certiorari*, as upon a judgment rendered in his absence. 2 *Harr.* 454.

Form of Notice.

SEC. 4. The following is a form of notice:

In the justice's court in and for .... township, county of ...., state of ....

....
against
....

The plaintiff in the above entitled cause will hereby take notice that I have appeared in said action by answer [or, "demurrer"], and will be ready for trial on the .... day of ...., 18...

....,
By his att'y, ...

Defendant's Default.

SEC. 5. If any of the defendants shall fail to answer or appear in the action within the time prescribed in the summons, such default shall be entered by the justice in his docket. *Stats.* 1867–1868, 552.

Justice's Entry of Default.

SEC. 6. The following is a form of justice's entry of default:

....
against
....

In this action the defendant, ..., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant, ..., in the premises is herely duly entered according to law.

Attest my hand this .... day of ...., A.D. 18...

...., Justice.

For form of judgment by default see JUDGMENT.

Failure of All Defendants to Appear.

SEC. 7. If all of the defendants shall fail to appear or answer within the time prescribed in the summons, the justice shall thereupon enter judgment against them for the amount demanded in the summons, where the action is brought upon a contract for the direct payment of money; and in all other cases shall hear the proofs and give judgment in accordance with the pleadings and proofs. *Stats.* 1867–1868, 552.

Failure of only Some of Defendants to Appear.

SEC. 8. Where all the defendants served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice may proceed to try the cause, or upon good cause shown by either party, may fix the day for trial on any subsequent day not more than ten days thereafter. *Stats.* 1867–1868, 552.

SEC. 9. Where the record shows, in general terms, the appearance of parties, the appearance will be confined to those parties served with process. 13 *Cal.* 558.

Failure of Either Party to Appear.

SEC. 10. If either party shall fail to appear at the time fixed for trial, or at the time to which the trial has been adjourned, the trial may proceed at the request of the adverse party, and judgment shall be rendered in conformity with the pleadings and proofs. *Stats.* 1867–1868, 552.

SEC. 11. If the plaintiff or some person on his behalf does not appear on the return of process before a justice, it is a discontinuance; and if the justice proceed in the cause it is error, even though, on the return of process, the note on which the suit was brought was delivered to the justice with a request of the defendant indorsed upon it to enter judgment against him. 9 *Johns.* 140.

Appearance by Attorney.

SEC. 12. The appearance of his attorney is equivalent

to the appearance of the party in an action before a justice. 2 *Penn.* 658.

SEC. 13. A justice is authorized to proceed with a trial where an individual appears as attorney for the defendant, makes oath that he is authorized to appear to answer to the suit, asks for no adjournment, but procures a subpena for witnesses for the defendant and proceeds to trial, and makes no objections to the proceedings. If the attorney so appearing has no authority, the remedy of the defendant is against the attorney. 18 *Barb.* (N. Y.) 387.

SEC. 14. A suit having been instituted in the name of the plaintiffs by an attorney of the court, it is to be presumed, *prima facie*, that they authorized the attorney to appear and prosecute. It is not matter in abatement that the plaintiffs, or either one of them, have not given this authority. The proper mode of procedure, if the suit was not authorized, is for the defendant to move the court, upon proper affidavits, to dismiss the suit, upon the ground that it was not authorized by those in whose names it was brought. If the attorney, on such a motion and after notice of it, fails to show his authority, the court may dismiss the case. But it would lead to great confusion to hold that the parties may be heard in the progress of a case on trial otherwise than through the attorneys appearing for them on the record. If a release or other paper has been executed by one of the parties, this may be pleaded, and its legal effect accorded to it; but it is not admissible, upon a mere suggestion at the bar by the adverse party or his attorney, to deny the right of a party to appear by the attorney of record, or to deny that the attorney so appearing has full authority to prosecute the suit. See *McKernan* vs. *Patrick*, 4 How. (Miss.) 336, and the cases there cited. 17 *Cal.* 432, 433.

CHAPTER XXVII.

ARREST.

	SECS.		SECS.
In what Cases the Defendant may be Arrested	1- 3	Form of Affidavit of Defendant that Justice is a material Witness in the Action	21
In what Cases the Defendant cannot be Arrested	4- 8	Officer to give Notice to Plaintiff and subscribe Certificate	22
Affidavit and Undertaking before Order of Arrest	9–13	Form of Notice by Officer to Plaintiff that Arrest has been Made	23
Form of Affidavit for Order of Arrest, Removal of Property, etc.	14–15	Form of Certificate to be Indorsed on Summons	24
Form of Arrest of Fraudulent Debtor	16	Duties of Officer and rights of Defendant	25
Form of Undertaking on Order of Arrest	17	Form of Undertaking by Defendant on Arrest	26
Form of Approval of Undertaking to be Indorsed thereon	18	What necessary to justify Execution against the Person	27–31
Form of Order of Arrest to be Indorsed on Summons	19	When Sureties on Defendant's Undertaking are Liable	32
Where Defendant upon being Arrested shall be Taken	20		

In what Cases the Defendant may be Arrested.

Section 1. The writ of arrest is only an intermediate remedy or process, to secure the presence of the party until final judgment. 6 *Cal.* 61; 10 *Cal.* 412.

Sec. 2. An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged in the following cases arising after the passage of this act:

1st. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors; or where the action is for a willful injury to the person, or for taking, detaining or injuring, personal property.

2d. In an action for a fine or penalty, or for money or

property embezzled, or fraudulently misapplied, or converted to his own use by an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity.

3d. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought.

4th. When the defendant has removed, concealed or disposed, of his property, or is about to do so, with intent to defraud his creditors. But no female shall be arrested in any action. *Gen. Laws*, 5475.

SEC. 3. In order to give the court jurisdiction of the subject matter, so as to enable it to issue orders or process, it is necessary that the action should be commenced. The practice act provides that the defendant may be arrested in a certain class of cases. Until there is a suit instituted, there can be no defendant, and consequently no authority, under the statute, to issue an order of arrest. 6 *Cal.* 320. Thus, where a complaint was not filed until two days after an order of arrest had issued thereupon, the order of arrest was void for want of jurisdiction. 6 *Cal.* 318, 321.

In what Cases the Defendant Cannot be Arrested.

SEC. 4. A party cannot be imprisoned under a judgment in a civil action for assault and battery. 6 *Cal.* 239.

SEC. 5. An assault and battery is not a case of fraud, in the sense that that term is employed by the constitution; neither can it be made so by the legislature; and the judgment is a debt as much as though recovered in an action of assumpsit. So also the provision in the practice act that the defendant may be arrested when the action is for willful injury to the person, etc., is directly in conflict with the constitution. 6 *Cal.* 240.

SEC. 6. The provision in the practice act for the arrest of a debtor in certain cases, does not apply in the case of one *partner* sueing to recover money received by another. Thus, A being the owner of an invoice of goods in the city of New York, sold one-half interest therein to B, with an arrangement that the latter should proceed to San Francisco, and there dispose of the same on joint account: it

was held, that this constituted a partnership between them, and that B was not subject to arrest in an action by A to recover part of the proceeds of the sales. 1 *Cal.* 346.

SEC. 7. In a suit to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal, and a refusal by him to pay. An arrest in such case is prohibited by section fifteen, article one, of the constitution. 1 *Cal.* 438.

SEC. 8. When a party is once arrested and discharged, he cannot be arrested again in the same action. 2 *Cal.* 609.

Affidavit and Undertaking before Order of Arrest.

SEC. 9. Before an order for an arrest shall be made, the party applying shall prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts on which the application is founded. The plaintiff shall also execute and deliver to the justice a written undertaking, with two or more sureties, to the effect that if the defendant recover judgment, the plaintiff will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall not be less than two hundred dollars. *Gen. Laws*, 5476.

SEC. 10. Where the allegations of a complaint are made and the verdict is sought in order that the judgment may be enforced by the arrest and imprisonment of the person of the defendant, they must bring the case clearly within the provisions of the statute authorizing arrests, and must be certain and positive, and not ambiguous, argumentative or in the alternative. 8 *Cal.* 623.

SEC. 11. The act which allows a party to be arrested in a civil case, requires the affidavit to disclose that a sufficient cause of action exists, and that the case is one of those for which the remedy of arrest is provided. The facts necessary to be shown must appear by the positive averments of the affidavit; and it is insufficient to refer to the complaint or to any other paper to show what the affidavit ought itself to disclose, although it is positively averred that such complaint or paper is true. 2 *Cal.* 609.

SEC. 12. To entitle a party to the remedy of arrest, it is not necessary he should show positively the commission of a fraud. It is sufficient if the circumstances detailed will induce, in a reasonable mind, the belief that a fraud was intended to be perpetrated. And as a matter of practice it is safest to award an arrest, even in cases of doubt, because the defendant is protected against the abuse of the process by the undertaking of the plaintiff, which the law requires to that effect, while on the other hand, frauds are proverbially concocted with so much artfulness and ingenuity as to render them at all times difficult to be exposed, and when such a case actually exists, the plaintiff is remediless, without the power of arrest. A different rule would almost, if not certainly, destroy its efficiency as a legal remedy. 3 *Cal.* 378.

SEC. 13. An affidavit for arrest which avers on information and belief that the defendant has been guilty of fraud in the contracting of the debt, or in endeavoring to prevent its collection, in the terms required by statute, and followed by an averment of the facts on which the belief is founded, also stated on information and belief, is sufficient. 6 *Cal.* 59.

Form of Affidavit for Order of Arrest for Departing from State, etc.

SEC. 14. The following is a form of affidavit for order of arrest for departing out of the state with intent to defraud creditors:

In the justice's court of .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

State of ....., county of ..... } ss.

...., of said county, being duly sworn, says: That he is the plaintiff in the above-entitled action; that the cause of action in this case arose after the passage of the act of the legislature of the state of ....., entitled "An act to regulate proceedings in civil cases in the courts of justice of this state," passed .....,'18..; that it is an action for the recovery of money or damages on a cause of action arising upon an express contract, and that the defendant in said action is about to depart from this state with the intent to defraud his creditors.

That the facts on which the application for an order of arrest of said defendant this day made is founded are as follows, to wit:

Said defendant has converted all his property into cash, at much less than its real value, and has, under the assumed name of ...., secured a passage on the steamer ....., advertised to sail this day for ....., and is now on said steamer with intent to leave this state. Said defendant, although he has met this affiant daily within the past week, and was yesterday requested to pay the plaintiff's claim, has never informed the plaintiff that he intended to leave the state; and yesterday, after having made full preparations to leave this day, promised the plaintiff to pay to-morrow at plaintiff's office. ....

Subscribed and sworn to before me, this .... day of ....., A.D. 18..

....,
Justice of the peace of said township.

Form of Affidavit for Order of Arrest—Removal, etc., of Property with Intent to Defraud Creditors.

SEC. 15. The following is a form of affidavit for order of arrest for removal, etc., of property with intent to defraud creditors:

In the justice's court of .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

State of .....,
county of .....,} ss.

...., of said county, being duly sworn, says: That he is the plaintiff in the above-entitled action; that the cause of action in this case arose after the passage of the act of the legislature of the state of ....., entitled "An act to regulate proceedings in civil cases in the courts of justice of this state," passed ....., 18..; that it is an action for the recovery of money or damages on a cause of action arising upon an express contract; that the said defendant has removed, concealed and disposed of, his property with intent to defraud his creditors.

That the facts on which the application for an order of arrest of said defendant this day made is founded are as follows, to wit:

Said defendant during last night had all his tobacco and cigars, the exact value of which is unknown to said affiant, but which said affiant believes to be of the value of .... dollars or thereabouts, being all the property of said defendant not exempt from execution, conveyed from his place of business on .... street, in ...., to some place or places to the said affiant unknown, and has to-day sold a large portion of said tobacco and cigars for cash; and falsely represents that he has only removed his stock, preparatory to putting it into a new place of business which he is about to open in ...., at number .. .... street in ....; and said affiant is informed by ...., the owner of the premises last aforesaid, that the same have not been leased to said defend-

ant, and that said defendant has never applied to said ..... for a lease of said premises for any purpose whatever. ....

Subscribed and sworn to before me, this .... day of ...., A.D. 18 .

....,
Justice of the peace of said township.

Form of Affidavit for Order of Arrest of Fraudulent Debtor.

SEC. 16. The following is a form of affidavit for order of arrest:

In the justice's court of ....township, in the county of ....., state of ....

....,
plaintiff,
against
....,
defendant.

State of .....,
county of ..... } ss.

...., of said county, being duly sworn, says: That he is the plaintiff in the above-entitled action; that the cause of action in this case arose after the passage of the act of the legislature of the state of ....., entitled "An act to regulate proceedings in civil cases in the courts of justice of this state," passed ...., 18 ... That it is an action for the recovery of money or damages on a cause of action arising upon an express contract; and that the defendant in said action has been guilty of a fraud in contracting the debt and incurring the obligation for which the said action is brought. That the facts on which the application for an order of arrest of said defendant, this day made is founded, are as follows, to wit: That defendant came to the store of said plaintiff, in ..... township, in the county of ....., on the ..... day of ....., and falsely represented himself to be the owner of real estate in said township, worth .... thousand dollars, and that his debts did not amount to .... thousand dollars, and thereupon purchased of the said plaintiff goods and merchandise for the sum of .... hundred dollars, agreeing to pay for the same on the following day: whereas, in truth and in fact, said defendant is not the owner of any real estate whatever, and is indebted to various parties in this state in over .... thousand dollars, and is wholly irresponsible. And said defendant, immediately after the purchase of said goods and merchandise, sold the same at less than one-half their real value, for cash, to one ...., in said county.

....

Subscribed and sworn to before me, this .... day of ....., A.D. 18 ...

....,
Justice of the peace of said township.

Form of Undertaking on Order of Arrest.

SEC. 17. The following is a form of undertaking on order of arrest:

In the justice's court of ...., township in the county of ....., state of ....

....,
plaintiff,
against
....,
defendant.

Whereas, an order to arrest the defendant in the above-entitled action is about to be issued: Now, therefore, we, the undersigned, do undertake, on the part of the plaintiff in said action, that if the said defendant recover judgment, the said plaintiff will pay to said defendant all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said arrest, not exceeding the sum of two hundred dollars.

Witness our hands and seals, in the county of ...., this .... day of ...., A.D. 18 ...

.... [L.S.]
.... [L.S.]
.... [L.S.]

State of .....,
county of ..... } ss.

.... and ....;, the sureties in the within undertaking, being duly sworn, each for himself, says: That he is a resident and freeholder within said county, and is worth double the said sum of .... hundred dollars, over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me, this .... day of ....., A.D. 18 ...

....,
Justice of the peace of said township.

Form of Approval of Undertaking to be Indorsed thereon.

SEC. 18. The following is a form of approval of undertaking to be indorsed thereon:

The within undertaking is hereby approved by me, this .... day of ...., A.D. 18 ...

....,
Justice of the peace of said township.

Filed ...., 18 ...

....,
Justice of the peace of said township.

Form of Order of Arrest to be Indorsed on Summons.

SEC. 19. The following is a form of order to be indorsed on summons:

State of .....,
county of ..... }

The people of the state of ....., to the sheriff, or any constable of said county, greeting:

You are hereby commanded to arrest the within-named defendant and

bring him before me forthwith (at my office in said township), to answer the plaintiff's complaint, filed in my office.

Given under my hand, this .... day of ....., A.D. 18 ...

....,
Justice of the peace of said township.

Where Defendant upon being Arrested shall be taken.

SEC. 20. The defendant, immediately upon being arrested, shall be taken to the office of the justice who made the order, and if he be absent or unable to try the action, or if it be made to appear to him by the affidavit of defendant that he is a material witness in the action, the officer shall immediately take the defendant before the next justice of the city or township, who shall take cognizance of the action and proceed thereon, as if the summons had been issued and the order of arrest made by him. *Gen. Laws*, 5477.

Form of Affidavit of Defendant that Justice is a Material Witness in the Action.

SEC. 21. The following is a form of affidavit of defendant that justice is a material witness:

In the justice's court of No. .... township, in the county of....., state of .....

....
plaintiff,
against
....
defendant.

State of .....
county of..... } ss.

....., of said county, being duly sworn, says: That he is the defendant in the above entitled action; that ...., esq., one of the justices of the peace of the above-named township, and the justice who made the order under which said defendant has been arrested, is a material witness in said action; that said ..... was present and heard said defendant, on the .... day of ....., 18.., negotiate with .... for a lease of the premises No. .... street, mentioned in plaintiff's affidavit, for the said order of arrest, and afterwards heard said ...., defendant, promise to pay said .... dollars a month for said premises, and that said .... attested thereto. ....

Subscribed and sworn to before me, this .... day of ....., A.D. 18..

....,
Justice of the peace.

Officer to Give Notice to Plaintiff and Subscribe Certificate.

SEC. 22. The officer making the arrest shall immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff. *Gen. Laws*, 5478.

Form of Notice by Officer to Plaintiff that Arrest has been Made.

SEC. 23. The following is a form of notice that arrest has been made:

In the justice's court of No. .... township, in the county of ....., state of .....

....,
plaintiff,
against
....,
defendant.

To Mr. ....., plaintiff [or, to the "attorney," or, "agent" of the plaintiff]:
Please take notice, that the defendant in the above entitled action has been arrested, and is now held under arrest by me.

....,
Constable of township No. ....

[Date.]

Form of Certificate to be Indorsed on Summons.

SEC. 24. The following is the form of certificate to be indorsed on summons:

I hereby certify that I have served the foregoing order by arresting and bringing into court the within-named defendant, this .... day of ....., A. D. 18.., and that I have given notice thereof to the within-named plaintiff this .... day of ...., A.D. 18..

....,
Constable of township No. ....

Duties of Officer and Rights of Defendant.

SEC. 25. The officer making an arrest shall keep the defendant in custody until duly discharged by order of the justice. *Gen. Laws*, 5479.

The defendant under arrest, on his appearance with the officer, may demand a trial immediately; and, upon such demand being made, the trial shall not be delayed beyond three hours, except by the trial of another action pending at the time; or, he may have an adjournment, and be discharged on giving bail, as provided in the next section. An

adjournment at the request of the plaintiff, beyond three hours, shall discharge the defendant from arrest, but the action may proceed notwithstanding; and the defendant shall be subject to arrest on the execution in the same manner as if he had not been so discharged. *Gen. Laws*, 5480.

If the defendant on his appearance demand an adjournment, the same shall be granted, on condition that he execute and file with the justice an undertaking, with two or more sufficient sureties, to be approved by the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and such as may be issued to enforce the judgment therein; or, that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action. On filing the undertaking specified in this section, the justice shall order the defendant to be discharged from custody. *Gen. Laws*, 5481.

Form of Undertaking by Defendant on Arrest.

SEC. 26. The following is a form of undertaking by defendant on arrest:

In the justice's court of .... township, No. .., in the county of ...., state of .....

...., plaintiff,
against
...., defendant.

Whereas, the defendant in the above-entitled action has been arrested at the suit of the plaintiff in said action, and has demanded an adjournment of the trial: Now, therefore, we, the undersigned, do undertake, on the part of the said defendant, that he will render himself amenable to the process of the court during the pendency of the said action, and such as may be issued to enforce the judgment therein; or, that we will pay to the plaintiff the amount of any judgment which he may recover in said action.

Witness our hands and seals, in the county of ...., this .... day of ...., A.D. 18...

.... [L.S.]
.... [L.S.]
.... [L.S.]

State of .....
county of ..... } ss.

.... and ...., the sureties in the within undertaking, being duly sworn, each for himself, says: That he is a resident and .....

holder within said county, and is worth the sum of .... dollars, over and above all his debts and liabilities, exclusive of property exempt from execution.

.... [L.S.]
.... [L.S.]

What Necessary to Justify Execution against the Person.

SEC. 27. The question of fraud must be submitted to the jury, except so far as may be necessary to authorize the arrest pending the action. To justify execution against the person, which may be followed by imprisonment, an issue must be framed and be determined like issues of fact raised upon the pleadings. Fraud is an offense involving moral turpitude, and is followed by imprisonment not merely as a means of enforcing payment, but also as a punishment, and it would indeed be strange if, on a mere question of indebtedness, the right to a trial by a jury should be held sacred and inviolate, and yet such trial be denied upon a question involving a possible loss of character and liberty. This latter question cannot be tried upon affidavits where the accuser is also witness, where the affidavits are not present, and no cross-examination of witnesses is allowed. 10 *Cal.* 412.

SEC. 28. To authorize a judgment convicting the defendant of fraud, the facts upon which the charge is based must be specifically alleged in the complaint. A judgment is the determination of the rights of the parties upon the facts pleaded, and it cannot in any event exceed the relief warranted by the case stated in the complaint. 10 *Cal.* 412.

SEC. 29. Execution against the person, unlike an execution against the property of the defendant which follows, as a matter of course, upon a money judgment, can only issue upon direction of the court to that effect, based upon the special facts found, and such facts cannot be considered by the jury unless averred by the pleadings. Side issues upon affidavits are not the issues upon which juries pass. The arrest upon affidavit is only intended to secure the presence of the defendant until final judgment, and in order to detain and imprison his person afterwards the fraud must be alleged in the complaint, be passed upon by the jury and be stated in the judgment. 10 *Cal.* 412.

SEC. 30. In nearly every case in which an arrest is allowed by the statute, the facts authorizing the arrest also constitute the cause of the action, and, of course, must necessarily be stated in the complaint. In the few instances where the circumstances authorizing an arrest occur subsequently to the filing of the complaint, application should be made to the court either to amend the original or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the enforcement of the judgment sought. By requiring the charges to be stated in the complaint, the rights of the defendant will be fully guarded. He can then meet the charges and have a fair opportunity of defending himself by a trial before the jury. There may be some inconvenience in blending, in the same trial, a question of indebtedness and a question of fraud, but there is no way of avoiding this and giving full protection to the defendant. A special finding on the question of fraud should be always taken, so as to keep it as distinct as possible from the main subject of controversy. 10 *Cal.* 412, 413.

SEC. 31. The facts on which the writ of arrest is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process. 6 *Cal.* 61.

When Sureties on Defendant's Undertaking are Liable.

SEC. 32. The sureties on the bail bond of a defendant, arrested in a civil action, are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. 8 *Cal.* 552. "The law requires no man to do a vain thing," is a familiar maxim, and certainly it would be in vain to require a party to surrender to an officer having no power to detain him. A surrender within ten days after execution, is a sufficient compliance with the statute. 8 *Cal.* 554.

CHAPTER XXVIII.

PRACTICE—ARGUMENT OF COUNSEL.

SECTION 1. The plaintiff, always in contemplation of law, has the affirmative, and has the right to open and conclude. 2 *Cal.* 408.

SEC. 2. The establishment and enforcement of rules, limiting the argument of counsel to a certain time, are matters resting in the sound discretion of the court, and are often necessary to prevent the time of the court from being wasted in useless and unprofitable discussion. 6 *Cal.* 636.

CHAPTER XXIX.

ARBITRATION.

SECTION 1. *Arbitration.*—A term derived from the nomenclature of the Roman law, is applied to an arrangement for taking and abiding by the judgment of a selected person in some disputed matter, instead of carrying it to the established courts of justice. The eighth section of the fourth book of the Pandects is devoted to this subject. Almost all the advantages as well as the defects of the system in modern practice seem to have been anticipated by the Roman jurists.

SEC. 2. Arbitration, in the law of England (according to Blackstone), is "where the parties, injured and injuring, submit all matters in dispute concerning any personal chattels or personal wrong, to the judgment of two or more arbitrators, who are to decide the controversy; and if they do not agree it is usual to add, that another person be called in as umpire *(imperator)*, to whose sole judgment it is then referred; or frequently there is only one arbitrator originally appointed."

SEC. 3. The rules which governed under the statute (9th and 10th *William III*, Cap. 15), do not differ materially

from those under our own statute. Under that, as under our own, submission of disputes to arbitration, may be by the consent of the parties, or with the interposition of a court of justice; by rule of court, or order of a judge, when a cause is pending, either by bond, agreement in writing or by parol. A verbal agreement, however, to abide by an award cannot be made a rule of court. The material difference between the statute of William III and our own, is, that the former was confined to disputes about personal chattels and personal wrongs, while our own law authorizes the submission to arbitration of every matter of dispute involving the right to property. Although the right of real property cannot pass by a mere award, yet if a party be awarded to convey land and refuse, he will be liable to an action, or to an attachment for not performing the award.

SEC. 4. *Appointment.*—Usually, a single arbitrator is agreed upon, or the parties each appoint one, with a stipulation, that, if they do not agree, another person, called an "umpire," named or to be selected by the arbitrators, shall be called in, to whom the matter is referred. The better rule is, for the arbitrators to call in the assistance of an umpire as soon as they begin to take the subject under consideration, as it secures a decision upon a single investigation of the controversy. 1 *Bart.* (N. Y.) 325; 4 *Rand.* (Va.) 275. Any person may be selected, notwithstanding natural incapacity or legal disability; as, infancy, coverture or lunacy. 1 *Pet.* 228; 26 *Miss.* 127.

SEC. 5. *The Proceedings.*—Arbitrators proceed on the reference as judges, not as agents of the parties appointing them. 1 *Ves. Ch.* 226; 9 *Ves. Ch.* 69. They should give notice [see form] of the time and place of proceeding, to the parties interested. *Pr. Act,* 383. They should all conduct the investigation together, and should sign the award in each other's presence (4 *Me.* 468); but a majority is held sufficient. 11 *Johns.* (N. Y.) 402. In investigating matters in dispute they are allowed the greatest latitude. 13 *East,* 251; 6 *Cow.* (N. Y.) 103; 1 *Hill* (N. Y.) 319. They are judges both of law and fact, and are not bound by the rules of practice adopted by the courts. 17 *How.* 344; 7

Met. (Mass.) 316, 486; 2 *Johns. Ch.* (N. Y.) 276, 386. They may decide according to equity and good conscience, and need not follow the law; the award will be set aside only when it appears that they meant to be governed by the law and have mistaken it. 9 *Ves.* 394; 14 *Cal.* 271. They must administer oaths to witnesses and hear the allegations and evidence of the parties. *Pr. Act*, 383.

SEC. 6. *Duties and Powers of.*—They cannot delegate their authority; it is a personal trust. 2 *Atk. Ch.* 401. The power ceases with the publication of the award (9 *Mo.* 30), and death after publication and before delivery does not vitiate it. 21 *Ga.* 1. They cannot be compelled to make an award—in which respect the common law differs from the Roman *(Story's Eq. Jur.* Sec. 1457); or to disclose the grounds of their judgment. 19 *Mo.* 373. The following statute and the decisions of the supreme court of this state interpreting the same, as far as questions connected therewith have been submitted, will be sufficient to guide in the proper appointment and duties of arbitrators:

SEC. 7. *Who may Submit Controversy to Arbitration.*—Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification shall not include questions relating merely to the partition or boundaries of real property.

Submission to Arbitration.—The submission to arbitration shall be in writing, and may be to one or more persons.

Entered as an Order of Court.—It may be stipulated in the submission that it be entered as an order of the county court or of the district court, for which purpose it shall be filed with the clerk of the county where the parties, or one of them, reside. The clerk shall thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award shall be made. When so entered the submission shall not be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the

award may be enforced by the court in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

Powers of Arbitrators.—Arbitrators shall have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

Majority may Determine Question.—All the arbitrators shall meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they shall be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties, in relation to the matters in controversy, and to make a just award, according to their understanding.

Award must be in Writing and Entered.—The award shall be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award shall be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award shall be entered by the clerk in the judgment book, and shall thereupon have the effect of a judgment.

May be Vacated in Certain Cases.—The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1st. That it was procured by corruption or fraud.

2d. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced.

3d. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

May Modify or Correct Award.—The court may, on motion, modify or correct the award where it appears:

1st. That there was a miscalculation in figures, upon which it was made, or that there is a mistake in the description of some person or property therein.

2d. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted.

3d. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

Subject to Appeal.—The decision upon the motion shall be subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion is made, shall not be subject to appeal.

Submission may be Revoked.—If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered shall only be the costs and damages sustained in preparing for and attending the arbitration. *Gen. Laws*, 5318–5327.

SEC. 8. The submission of a cause to arbitration operates as a discontinuance, and the suit ceases to be pending in court. This is the common-law doctrine. In England, it is only by virtue of the statutes (9 and 10 *Will. III*, Cap. 15, and 3 and 4 *Will. IV*, Cap. 42), that *judgment* may be entered upon the award of arbitrators, and enforced as a *judgment* of the court. Previous to these statutes the method of enforcing an award was by action (1 *Chitty's Pl.* 144, 116, 124), except in those cases where the submission was made a rule of court and enforced by attachment, as for a contempt (*Kyd on Awards*, 21), an innovation introduced by the English courts, but not sanctioned by American practice. The rule of enforcing an award by action prevails generally in the United States, except where otherwise provided by statute. In many if not all of the states,

the statutes above cited have been, in substance, re-enacted, but here we have no statute upon the subject. 1 *Cal.* 47.

SEC. 9. The rule is general that arbitrators must pass upon all matters submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face and can be set aside on motion; but if the submission is general of all matters in controversy, without specification, it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon or the award will be void *in toto*, and be set aside upon a proper showing of the omission. 12 *Cal.* 339. Thus, a submission embraced three subjects: One to determine all actions between the parties; another to fix the value to be put upon hop-poles and potatoes in certain land; and the third to ascertain the rent to be paid for other land. The arbitrators made their award upon the first two subjects, but omitted to notice the last, and it was held that the whole award was vitiated by the omission. 12 *Cal.* 339.

SEC. 10. An agreement, in writing, between two parties to submit matters in difference between them to an arbitrator, with power to award and adjudge all matters in difference between them, and to make an award in writing, and that his award when made may be entered as a judgment of any court of record having jurisdiction, does not give any court jurisdiction of the parties litigant or of the subject-matter of the controversy, unless the agreement further stipulate that the submission may be entered as an order of court, and the submission and stipulation are filed with the clerk, and the clerk enter in his register of actions a note of the submission, with the names of the parties, the name of the arbitrator, etc., as required by the three hundred and eighty-second section of the practice act. 30 *Cal.* 218.

SEC. 11. *An Award of Arbitrators.*—An award to be valid must be certain and decisive as to the matters submitted, and thus avoid all further litigation. 37 *Cal.* 197.

SEC. 12. An award by arbitrators selected to settle

accounts between parties, that one of the parties is entitled to credit of a certain sum on his account with the other, is not final and decisive as to the matter submitted, and is not therefore valid. 37 *Cal.* 197.

SEC. 13. An award of arbitrators is not admissible in evidence unless it is final and conclusive upon the matter submitted. 37 *Cal.* 197.

SEC. 14. The following is a form of agreement of general —or special—submission to arbitration:

Agreement of General—or Special—Submission to Arbitration.

We, the undersigned, mutually agree to submit, and do hereby submit, all our matters in difference, of every name or nature [or, if it be a special matter of difference to be submitted, omit the words "of every name or nature," and use the words "in relation to," and particularly describe the subject matter submitted] to the award and decision of ...., ... and ...., for them to hear and determine the same, and make their award, in writing, on or before the .... day of .... 18..

Witness our hands, this .... day of ...., A.D. 18..

....

....

In presence of

....

SEC. 15. When parties agree to submit their differences to arbitration they may—and it is safest so to do—obligate each other to abide and perform the award of the arbitrators, by executing and delivering, each to the other, a bond which may be substantially as follows:

Bond of Arbitration.

Know all men by these presents: That I, ..., of ...., am held and firmly bound to ...., of ...., in the sum of .... dollars, lawful money of the United States, to be paid to the said ...., or to his executors, administrators or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents.

Sealed with my seal, dated the .... day of...., A.D. 18..

The condition of the above obligation is such, that if the above bounden ...., his heirs, executors and administrators, shall and do, in all things well and truly abide by, keep and perform, the award and final determination of ...., ... and ...., of ...., arbitrators, as well on the part and behalf of the above bounden ...., as of the above-named ...., concerning all matters of difference of every name or nature [or, the specific matter, which should be here repeated] submitted to said arbitrators, by the agreement in writing entered into by the above bounden and

the said ...., dated the .... day of ...., A.D. 18.., when the said award shall be made, in writing, under the hands of the said arbitrators, or any two of them, and ready to be delivered to the above bounden and to the said ...., or to such one of them as shall desire the same, on or before the .... day of ...., A.D. 18.., then this obligation to be void or else to remain in full force.

.... [L.S.]
.... [L.S.]

Sealed and delivered in presence of

....

SEC. 16. The following is a form of notice to arbitrators of their appointment:

Notice to Arbitrators of their Appointment.

To ...., ... and ...., esquires:

You are hereby notified that you have been nominated and chosen arbitrators, as well on the part and behalf of the undersigned ...., of ...., as of ...., of ...., also undersigned, to arbitrate, award, etc. [specifying the time within which, as stated in the submission or bond, the award must be made]; and you are requested to meet the said parties at the office of ....., in the town of ....., on the ..... day of ....., A.D. 18 .., at the hour of .. o'clock, A.M. of that day, for the purpose of fixing upon a time and place when and where the allegations and proofs of the said parties shall be heard.

Dated the ..... day of ....., A.D. 18 ...

Yours, etc.,

....
....

SEC. 17. The following is a form of notice of hearing in an arbitration:

Notice of Hearing in an Arbitration.

In the matter of the arbitration of and concerning certain matters [or, "a certain matter"] of difference between ....., of the one part, and ...., of the other part.

Sir: You will please take notice that the arbitrators have appointed a hearing in the matter above specified to be had before them, at the [describe the place] on the .... day of ....., A.D. 18 .., [give the hour of the day].

Dated the .... day of ....., A.D. 18 ...

....,
Or ... ., attorney for ....,
Or ...., ..., ..., arbitrators.

SEC. 18. The following is a form of notice of revocation of powers of arbitrators by both parties:

Notice of Revocation of Powers of Arbitration by both Parties.

To ...., ... and ...., esquires.

Take notice, that we do hereby revoke your powers as arbitrators, under

the submission made to you by us, in writing, and [if it be by an order of court] entered as an order of the ..... district court, on the ..... day of ....., A.D. 18 ...

....,
....

SEC. 19. The following is a form of notice of revocation by one party of the powers of arbitrators (the submission not having been entered as an order of court):

Notice of Revocation by one Party, etc.

To ....

You are hereby notified that I have this day revoked the powers of ...., ..., and ...., arbitrators, chosen to settle the matters in controversy between us, and that the following is a copy of such revocation [insert the revocation made by one of the parties only].

Dated the .... day of ....., 18 ...

Yours, etc.,

....

SEC. 20. The following is a form of arbitrator's oath:

Arbitrator's Oath.

You do solemnly swear, faithfully and fairly to hear and examine the matter in controversy between ...., of the one part, and ...., of the other part, and to make a just award, according to the best of your understanding.

CHAPTER XXX.

ATTACHMENT.

	SECS.
CHARACTER OF ATTACHMENT...	1– 5
IN WHAT ACTIONS IT MAY ISSUE.	6– 7
ATTACHMENTS FOR DEBTS NOT DUE.....	8–11
WHEN THE WRIT MAY ISSUE....	12–18
THE AFFIDAVIT.....	19–21
FORM OF AFFIDAVIT FOR ATTACHMENT AGAINST RESIDENT ...	22
FORM OF AFFIDAVIT FOR ATTACHMENT AGAINST NON-RESIDENT.	23
THE UNDERTAKING	24–25
FORM OF UNDERTAKING.....	26–30
THE WRIT OF ATTACHMENT....	31–33
THE FORM OF WRIT.....	34
FORM OF UNDERTAKING ON RELEASE OF ATTACHMENT....	35
THE PROPERTY SUBJECT TO ATTACHMENT	36–41
THE EXECUTION OF THE WRIT..	42–54
WHEN THE LIEN TAKES EFFECT	55–59
CONTESTS BETWEEN ATTACHING CREDITORS.....	60–68
GARNISHMENT.....	69–78
FORM OF GARNISHMENT.....	79
EXAMINATION OF DEFENDANT AND HIS DEBTOR OR BAILEE....	80–83
FORM OF ORDER OF EXAMINATION OF DEFENDANT..... ...	84
FORM OF CONSTABLE'S CERTIFICATE OF SERVICE OF ORDER	85
FORM OF ORDER OF EXAMINATION OF DEBTOR OF DEFENDANT..	86
FORM OF CONSTABLE'S CERTIFICATE OF SERVICE OF ORDER	87
INVENTORY OF PROPERTY ATTACHED.....	88
CONSTABLE'S RETURN OF WRIT	89–90
FORMS OF CONSTABLE'S RETURN OF WRIT.....	91–96
DUTY OF CONSTABLE WITH RESPECT TO PROPERTY ATTACHED 97–102	
CLAIMS BY THIRD PERSONS....103–104	
THE INDEMNITY BOND.....105–107	
FORM OF INDEMNITY BOND....	108
DISCHARGE OF ATTACHMENT AFTER LEVY.....	109
UNDERTAKING ON SUCH DISCHARGE 110–114	
FORM OF UNDERTAKING ON SUCH DISCHARGE.....	115
DISCHARGE OF ATTACHMENT FOR BEING IMPROPERLY OR IRREGULARLY ISSUED.116–119	
SUITS AGAINST PLAINTIFF IN ATTACHMENT.....	120

Character of Attachment.

SECTION 1. The remedy by attachment is not a distinct proceeding in the nature of an action *in rem*, but is an adjunct or a proceeding auxiliary to the action at law, designed for the purpose of securing the property of the debtor to answer the judgment which may be obtained. This is apparent from the language of the practice act. It is the creature of the statute. 2 *Cal.* 24; 3 *Cal.* 365.

SEC. 2. So also is the remedy of garnishment. These remedies cannot be extended to cases not named in the act. 3 *Cal.* 365.

SEC. 3. As the proceeding of attachment is of statutory origin and unknown to the common law, all the provisions of the act must be strictly complied with. It is a harsh remedy at best, and a party who seeks to enforce it against another should be held to a strict accountability and compliance with the law. 7 *Cal.* 565.

SEC. 4. Our statute has prescribed who may issue an attachment and take the proper bond, and under what circumstances. This must be respected. The court cannot change the law; it can only administer it. Every officer is presumed to know his duty; if he does not and transcends his powers, the responsibility rests with him. 2 *Cal.* 255.

SEC. 5. The act of issuing an attachment is merely ministerial, and there is no intendment in favor of the regularity of the process. 7 *Cal.* 562.

In what Actions Attachment may Issue.

SEC. 6. In an action upon a contract, express or implied, made after the twenty-eighth day of April, 1860, for the direct payment of money, which contract is made or is payable in this state, and is not secured by mortgage, lien or pledge, upon real or personal property, the plaintiff, at the time of issuing the summons or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment as hereinafter provided. *Gen. Laws*, 5482.

SEC. 7. The process of attachment is a remedy only given in cases of indebtedness arising upon contract (2 *Cal.* 24), and upon those contracts for the direct payment of money which are made in or are payable in this state. The right of attachment does not exist, except where the contract is made within this state, or if made without it, then accompanied by a stipulation between the parties to it that the money is to be paid here. A subsequent promise to pay here cannot affect the question in any manner when the suit is brought upon the original contract. Thus, a debt due for merchandise sold in Boston, to residents of San Francisco, and forwarded to the latter, they

stipulating to pay by remitting funds to Boston, is not the subject of an attachment. *Dalton* vs. *Shelton*, 3 Cal. 207, 208.

Attachments for Debts not Due.

SEC. 8. An attachment issued upon a debt not due is void as against creditors whose rights are injuriously affected by it. *Davis* vs. *Eppinger*, 18 Cal. 378.

SEC. 9. It is, at least, *prima facie* void as against another attachment, where the first is issued before the maturity of the debt. The attempt is against law and a fraud on the other creditors, for whom some remedy ought to be provided. If, therefore, the plaintiff, when he caused the attachment to be made on his writ, had no cause of action, he cannot claim the benefit of his attachment against a creditor having a good cause of action. 13 *Cal.* 441.

SEC. 10. But where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought. The debt in such case is equitably due, and there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself. *Patrick* vs. *Montador*, 13 Cal. 434.

SEC. 11. Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and before the maturity of the notes B., apprehending that G. & Co. would fail before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment, obtained by an arrangement with G. & Co. an ante-dated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co., it was held, that B.'s attachment and claim was valid against subsequent attaching creditors, the case not being one either of actual or constructive fraud. *Brewster* vs. *Bours*, 8 Cal. 506.

When the Writ may Issue.

SEC. 12. An attachment issued before the issuance of the

summons in the suit, is void, and the subsequent issuance of the summons cannot cure it. 9 *Cal.* 538.

SEC. 13. The fact that a party is indebted to another is not sufficient of itself to warrant the issuing of an attachment. The party is required to make affidavit that the debt sued on arises out of a contract for the direct payment of money, made or payable in this state, and is not secured by mortgage on real or personal property; this affidavit must be made in a suit pending, and be accompanied with a bond, and the suit, affidavit and bond, are a necessary predicate for the writ, and should be shown in evidence the same as a judgment. 7 *Cal.* 562.

SEC. 14. *When Proper to Issue.*—The policy of the law is, that a creditor holding a security by way of "mortgage, lien or pledge, upon real or personal property," shall not resort to the summary process of attachment until he has exhausted his security. But such lien or pledge must be of a fixed, determined character, capable of being enforced with certainty and depending on no conditions. *Porter* vs. *Brooks*, 35 Cal. 199.

SEC. 15. A pledge of personal property is a "mortgage," within the meaning of the attachment act; the word being there used in its most general signification, meaning "security." 8 *Cal.* 260.

SEC. 16. *Duty of Clerk in Issuing Writs.*—While the clerk of the district court [justice] is bound to issue writs of attachment in the order in which they are demanded, yet if the party who makes the first demand is not in attendance to receive his writ when completed, the clerk [justice] is not bound in the meantime to delay the issuing of other writs against the same party. *Lick* vs. *Madden*, 36 Cal. 208.

SEC. 17. When the clerk [justice] has prepared for delivery the writ first demanded, he is bound to issue the writ to the next comer, and if in such case the first comer is not there to receive his writ and for that reason the next comer first delivers his writ to the sheriff [or constable] and by that means acquires a priority and the first comer loses his debt, the clerk [justice] is not liable. 36 *Cal.* 208.

SEC. 18. If the clerk [justice] first issues the writ of attachment secondly demanded, but if, notwithstanding, he

has the writ first demanded prepared and ready for delivery as soon as it is called for, he is not liable for the damages sustained by the first party because the second obtains the first levy. 36 *Cal.* 208.

The Affidavit.

SEC. 19. A writ to attach the property of the defendant shall be issued by the justice, on receiving an affidavit by or on behalf of the plaintiff, showing the following facts:

1st. That the defendant is indebted to the plaintiff [specifying the amount of such indebtedness, over and above all legal set-offs and counter-claims], upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage, lien or pledge, upon real or personal property.

2d. That the defendant is indebted to the plaintiff [specifying the amount of such indebtedness as near as may be, over and above all legal set-offs or counter-claims], and that the defendant is a non-resident of the state.

3d. That the sum for which the attachment is asked, is an actual, *bona fide*, existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud, any creditor or creditors of the defendant. *Pr. Act*, 559; *Gen. Laws*, 5483, 5061.

SEC. 20. The fact that an affidavit for an attachment omits to aver that the sum for which the writ is asked is "an actual, *bona fide*, existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud, any creditor or creditors of the defendant," does not render the attachment issued a nullity as against subsequent attaching creditors. 18 *Cal.* 152.

SEC. 21. An affidavit for attachment ought to state the ground in positive terms, and is insufficient if it avers that the defendant is indebted to the plaintiff upon an express *or* implied contract. A description in the alternative has always been held insufficient. The attachment upon such affidavit should be quashed. 4 *Cal.* 195.

Form of Affidavit for Attachment against Resident.

SEC. 22. The following is a form of affidavit for attachment against resident:

In the justice's court of .... township, in the county of ...., state of ....

....
plaintiff,
against
....
defendant.

State of .....,
county of .....} ss.

...., of said county, being duly sworn, says: That he is the plaintiff [or, "one of the plaintiffs"] in the above-entitled action, [or, ... "..... of said county, being duly sworn on behalf of the plaintiff in the above-entitled action, says: That he is the agent of the said plaintiff, who is temporarily absent from said county, and that said affiant is better informed of the facts constituting the cause of said action than said plaintiff, which is the reason this affidavit is not made by said plaintiff," or, state other reasons, according to the facts]. That the defendant in said action is indebted to the said plaintiff in the sum of .... dollars, gold coin of the United States, over and above all legal set-offs and counter-claims, upon an express contract for the direct payment of money, to wit: upon a certain promissory note dated ...., ..., made by said defendant to said plaintiff, for the sum of .... dollars, gold coin of the United States, payable .... year after date, with .... per cent. per month interest after due; and that said contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage, lien or pledge, upon real or personal property, and was made subsequent to the .... day of ...., 18..:

And that the sum for which the attachment is asked in said action, that is to say, the amount of indebtedness which is above stated, is an actual, *bona fide*, existing debt, due and owing from the said defendant to the said plaintiff; and that the said attachment is not sought, and the said action is not prosecuted, to hinder, delay or defraud, any creditor or creditors of said defendant.

....

Subscribed and sworn to before me, this ..... day of ....., 18..

....
Justice of the peace of said township.

Form of Affidavit for Attachment Against Non-Resident.

SEC. 23. The following is a form of affidavit for attachment against non-resident:

In the justice's court in and for ..... township, county of ....., state of .....

....,
plaintiff,
against
....,
defendant.

State of .....
county of .....} ss.

...., of said county, being duly sworn, says: That he is the plaintiff

[or, "one of the plaintiffs"] in the above-entitled action [or, ".... ....., of said county, being duly sworn on behalf of the plaintiff in the above-entitled action, says: That he is the attorney for the said plaintiff, who is temporarily absent from the state of ....., and that said affiant is as well informed of the facts hereinafter stated as said plaintiff, which are the reasons this affidavit is not made by said plaintiff," or, state other reason according to the facts. See foregoing forms].

That the defendant in said action is indebted to the said plaintiff in the sum of .... dollars, gold coin of the United States, over and above all legal set-offs and counter-claims [specifying the amount of such indebtedness as near as may be, over and above all legal set-offs or counter-claims].

That said sum of .... dollars is a balance due for work and labor done by said plaintiff at the special instance and request of said defendant, and that the said defendant is a non-resident of this state. That the sum for which the attachment is asked in the said action, that is to say: the amount of indebtedness which is above stated, is an actual, *bona fide*, existing debt, due and owing from the said defendant to the said plaintiff; and that the said attachment is not sought and the said action is not prosecuted to hinder, delay or defraud, any creditor or creditors of the said defendant.

....

Subscribed and sworn to before me, this .... day of ...., A.D. 18..

....., ...,
Justice of the peace of said township.

The Undertaking.

SEC. 24. Before issuing the writ, the justice shall require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment. *Gen. Laws*, 5484.

SEC. 25. The practice act does not require the undertaking on attachment to be executed in form to the defendants, but specifies the conditions it shall contain. An undertaking given to the state of California instead of the defendants is not materially defective. The defendants being the parties really in interest can sue upon the undertaking in their own names. 7 *Cal.* 518.

Form of Undertaking on Attachment.

SEC. 26. The following is a form of undertaking on attachment:

In the justice's court of ....., township in the county of ....., state of .....

....,
plaintiff,
against
....,
defendant.

Whereas, an attachment against the property of the defendant in the above-entitled action has been this day demanded, and is about to issue: Now, therefore, we, the undersigned, do undertake, on the part of the plaintiffs in the said action, that if the said defendant recover judgment, the said plaintiffs will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of .... hundred dollars.

Witness our hands and seals, in the county of ....., this .... day of ....., A.D. 18 ...

.... [L.S.]
.... [L.S.]
.... [L.S.]

State of .....
county of ..... } ss.

.... and .... the sureties in the within undertaking, being duly sworn, each for himself, says: That he is a resident and householder within the said city and county, and is worth double the amount stated in the said undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.

....
....

Subscribed and sworn to before me, this .... day of ....., A.D. 18 ...

....,
Justice of the peace of said township.

SEC. 27. The bond is the antecedent of the attachment, and accompanies, in point of time, the affidavit which must be made before the writ is issued. It depends for its legal effect upon the writ. If no writ were issued, such a bond would be null and void; it could have no effect except as connected with the attachment—they exist together. 2 *Cal.* 255.

SEC. 28. If a justice issue an attachment, and take a bond in a suit for a sum exceeding his jurisdiction the proceedings are void, and no action lies on the bond. 2 *Cal.* 251.

SEC. 29. An attachment bond executed after the writ has been levied, and the attachment dismissed by the plaintiff is void. And in a suit on an attachment bond, if the bond is void, the obligee cannot recover for injury sustained by the attachment. 2 *Cal.* 251.

SEC. 30. If the defendant recover judgment against the plaintiff any undertaking received in the action, all the proceeds of sales and money collected by the sheriff or constable, and all the property attached remaining in the sheriff's or constable's hands, shall be delivered to the defendant or his agent, the order of attachment shall be discharged, and the property released therefrom. *Gen. Laws*, 5075, 5486.

The Writ of Attachment.

SEC. 31. The writ may be directed to the sheriff or any constable of the county, and shall require him to attach and safely keep all the property of the defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs; in which case, to take such undertaking. *Pr. Act*, 554; *Gen. Laws*, 5485.

SEC. 32. An attachment issued by A, "one of the justices of the peace for said county," is good, although signed by A's name merely, without the words "justice of the peace," or the initials "J. P." 20 *Geo.* 735. The name should be signed in full, and it should be signed officially.

SEC. 33. A writ of attachment is effectual to change the title of personal property only from the time of levy. *Tafft* vs. *Manlove*, 14 Cal. 47.

Form of Writ of Attachment.

SEC. 34. The following is a form of writ of attachment:

In the justice's court of .... township, in the county of ...., state of .....

...., plaintiff,
against
...., defendant.

The people of the state of .....,

To the sheriff or any constable of the county of ...., greeting:

You are hereby commanded to attach and safely keep all the property of the above-named defendant in this county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, to wit:

.... hundred dollars, gold coin of the United States, besides the costs, unless the said defendant shall give you security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy said demand, besides costs, in which case you will take such undertaking.

Make due return hereof.

Given under my hand, at the county of ...., this .... day of ..... A.D. 18...

....,
Justice of the peace of said township.

Undertaking on Release of Attachment to be given to Constable.

SEC. 35. The following is a form of undertaking on release of attachment to be given to the constable:

In the justice's court of .... township, in the county of ...., state of .....

....,
plaintiff,
against
....,
defendant.

Whereas, the above-named plaintiff has commenced an action in the aforesaid court against the above-named defendant, for the recovery of .... hundred dollars, gold coin of the United States; and whereas, an attachment has been issued, directed to the sheriff or any constable of the county of ...., and placed in the hands of ...., constable, for execution, whereby he is commanded to attach and safely keep all the property of the said defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, therein stated, in conformity with the complaint, at .... hundred dollars, gold coin of the United States, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy said demand, besides costs, in which case to take such undertaking;

And whereas, the said defendant is desirous of giving the undertaking mentioned in the said writ:

Now, therefore, we, the undersigned, residents of the county of ...., in consideration of the premises, and to prevent the levy of said attachment, do hereby jointly and severally undertake, in the sum of .... hundred dollars, gold coin of the United States, and promise to the effect, that if the said plaintiff shall recover judgment in said action, we will pay to the said plaintiff, upon demand, the amount of said judgment, together with the costs, not exceeding in all the sum of .... dollars, gold coin of the United States.

Dated the .... day of ...., 18...

.... [L.S.]
.... [L.S.]

State of .....,
county of .....

.... and ...., whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself says: That he is a resident and .... holder of the county of ...., and is

worth double the amount stated in the said undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.

....
....

Subscribed and sworn to before me, this .... day of ...., A.D. 18...

....,
Justice of the peace.

The Property Subject to Attachment.

SEC. 36. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, and all debts due such defendant, and all other property in this state of such defendant, not exempt from execution, may be attached and if judgment be recovered, be sold to satisfy the judgment and execution. *Pr. Act*, 124; *Gen. Laws*, 5064, 5486.

SEC. 37. Lawful possession of personal property is *prima facie* evidence of ownership; and property thus possessed, is *prima facie* liable to be seized under a writ of attachment against the party in possession of such property. In an action against a sheriff to recover property thus seized or its value, by the owner, it is necessary that the plaintiff should show, affirmatively, notice and demand before bringing suit, otherwise he cannot recover in such action. In such a case, it is not necessary that the defendant should specially plead want of notice and demand, in order to make such a defense. 12 *Cal.* 73.

SEC. 38. Money in the hands of the sheriff collected on execution, is not a debt due to the plaintiff in execution, but is in the custody of the law until finally and properly disposed of. It cannot, therefore, be the subject of attachment or garnishment. Any attempt of the sheriff to attach what is in his own hands, is irregular. The sheriff acquires a special property in whatever comes to his hands, by virtue of his office, and if it is at any time subject in his hands to other process, to which he must necessarily be a party, such process must be executed by the coroner. 3 *Cal.* 365.

SEC. 39. Where money has been placed on general deposit in a bank, and negotiable certificates of deposit have been issued to the depositor for the amount, there is nothing left in the possession of the bankers belonging to the depos-

itor upon which an attachment issued against his property can fasten. The bankers, by their certificates, become liable, not to refund to the depositor the specific money deposited, but to pay its amount to the holder of the certificates, whoever he may be, on their presentation. 9 *Cal.* 366.

SEC. 40. The filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution. It is only in cases of insolvency that the equitable rule for a *pro rata* distribution will apply, and then as of necessity. If the firm be solvent, a creditor whose claim is due cannot be placed on a par with others whose claims are not yet due, or who have been less diligent in securing claims already due. Funds in the hands of a receiver, in a suit for dissolution, are therefore subject to attachment at any time before a final decree of dissolution and distribution. 9 *Cal.* 24.

SEC. 41. Defendants were expressmen, with an office at Coulterville, in Mariposa county. One George W. Coulter was their agent. Walling, the plaintiff, delivered to defendants a quantity of amalgam to be forwarded to San Francisco, to be there coined and returned. This amalgam belonged to five persons who were partners in quartz mining, the plaintiff and one Carpenter among them. On the first of July, 1858, while this property was in the hands of these carriers, Carpenter sold to plaintiff, for a valuable consideration, his interest in this amalgam, and gave his receipt to the plaintiff, evidencing the contract. The defendants the next day returned to Coulterville with the coin made of the dust in San Francisco, and deposited it with Coulter, their agent, and on the same evening the coin was attached by a constable for debts of Carpenter. The defendants had no notice of this transfer to the plaintiff until after the attachment; but on the next day the plaintiff gave notice to defendants, and demanded the share of Carpenter of this coin still in their, or their agent's, possession. De-

fendants refused to pay it over, but afterwards paid it to the constable. Upon these facts the judge found that the plaintiff could not recover, basing his judgment upon the provisions of the statute of frauds, which require possession of personal property to accompany and follow a sale in order to its validity as to third persons. The supreme court say: "In this ruling we think the court below manifestly erred. The statute has no application to such a case as this. The property here was joined; Carpenter had no defined and exclusive interest in any part, but merely a common interest in all with his partners. The property was in constructive possession of all, the possession of the bailees being the possession of their principals. It was not money, but to be converted into money. After it was so converted, it required division before any particular portion of the coin became the property of any one of the partners. The right of Carpenter was a chose in action, which he could assign in any legal mode. He could assign it by order in favor of the purchaser or assignee. He did so assign. At the time of the assignment there was no possibility of a manual delivery of the specific coin to which he was entitled. The order was a good assignment of his right, after which Carpenter had no title to the money, and his creditors, representing only his right, could not seize it for his debts. The case is not different from the case of an order on a banker for a general balance, in which case the order operates a complete assignment, and protects, if the transaction be fair and for a valuable consideration, the money against the process of creditors. The service of the attachment upon the defendants was only a garnishment; and it is well settled that this does not give the creditor precedence over assignees of the fund when the assignment is prior to the service of the garnishment. *Walling* vs. *Miller & Co.*, 15 Cal. 39, 40.

The Execution of the Writ.

SEC. 42. The sheriff or constable to whom the writ is directed and delivered shall execute the same without delay, and if the undertaking mentioned in section one hundred and twenty-three be not given, as follows:

1st. Real property standing upon the records of the county in the name of the defendant shall be attached by leaving a copy of the writ with an occupant thereof, or if there be no occupant by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county.

2d. Real property, or any interest therein, belonging to the defendant, and held by any other person or standing on the reords of the county in the name of any other person, shall be attached by leaving with such person or his agent a copy of the writ and a notice that such real property [giving a description thereof] and any interest therein, belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county, and leaving a copy of such writ and notice with an occupant of such property, or if there be no occupant by posting a copy thereof in a conspicuous place thereon.

3d. Personal property capable of manual delivery shall be attached by taking it into custody.

4th. Stock or shares of interest in stock, or shares of any corporation or company, shall be attached by leaving with the president or other head of the same, or the secretary, cashier or other managing agent, thereof, a copy of the writ and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ.

5th. Debits and credits and other personal property not capable of manual delivery shall be attached by leaving with the person owning such debts, or having in his possession or under his control, such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, on the credits and other personal property in his possession or under his control belonging to the defendant, are attached in pursuance of such writ. *Gen. Laws*, 5065, 5486.

SEC. 43. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff or constable shall serve upon

such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ. *Pr. Act*, 126; *Gen. Laws*, 5066, 5486.

SEC. 44. The service of an attachment is not the bringing of an action. 9 *Cal.* 28.

SEC. 45. The deposit in the recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. 11 *Cal.* 238.

SEC. 46. The statute provides that an attachment of real property shall be made by the officer to whom the writ is directed, "by leaving a copy of the writ with the occupant thereof; or if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county." The two acts prescribed—the delivery to the occupant of a copy of the writ, or the posting of a copy upon the premises, as the case may be, and the filing of a copy in the recorder's office, with a description of the property attached—must be done before the lien of the attachment is perfected. The omission of either is fatal to the creation of the lien. The two acts are requisite to perfect the attachment. It is the duty of the officer, after he has once entered upon the execution of the writ, to complete its execution with diligence. In the case of *Wheaton* vs. *Neville*, the supreme court say: "The writ was issued at the commencement of the action of Scott, Vantine and others, against Brown, on the twenty-sixth of August, and a copy was delivered to the occupant of the premises, or posted upon them, on the twenty-ninth of the same month. On this last day the writ was returned with a certificate of the sheriff's proceedings, and filed in the clerk's office; but no copy of the writ, with a description of the property, was filed in the recorder's office until the ninth of September following. On the sixth of September, Dimock purchased and took a conveyance of the premises from Brown; and the question for determination is, whether the subsequent filing of the papers in the recorder's office gave effect to the attachment, from the date of the posting or delivery of the copy of the

writ, so as to create a lien upon these premises." We are clear that the filing in the recorder's office had no such effect, independent of any consideration of the applicability of the doctrine of relation. After the return of the writ to the clerk's office, the sheriff had no authority to take any proceedings for the completion of the attachment, which he had previously omitted. Its efficacy as a warrant of authority to him was limited to acts performed whilst it remained in his possession. The filing was therefore ineffectual for any purpose; and the posting of a copy of the writ upon the premises, or the delivery of a copy to the occupant was, of itself, insufficient to perfect the attachment. There was, in consequence, no lien created upon the premises. *Wheaton* vs. *Neville*, 9 Cal. 44, 45.

SEC. 47. A levy upon personal property is the act of taking possession of, seizing or attaching, it by the sheriff or other officer. 14 *Cal.* 50, 51.

SEC. 48. A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in due course of law; and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. 12 *Cal.* 539.

SEC. 49. A levy may be good as against the defendant in the writ, when it would not be good as to third persons. This distinction is not based upon any difference in the legal requisites of a levy, but in the fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver or an estoppel, or an agreement that *that* shall be a levy which, without such conduct, would not be sufficient. 14 *Cal.* 50.

SEC. 50. Where an officer attaches the property of the defendant, he does not act as the agent of the plaintiff, but as the officer of the law; but when he attaches property that does not belong to the defendant, he goes beyond the command of the writ, and acts as the agent of the party at whose instance he does the act. 8 *Cal.* 259.

SEC. 51. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. 13 *Cal.* 340.

SEC. 52. The sheriff can no more officially receive a writ on Sunday for service on Sunday than he can execute it on Sunday. Both these acts are of the same general character, and equally within the prohibition of the statute. Not receiving it then as sheriff, he receives it as the mere agent of the plaintiff. He so receives it, not to execute it on Sunday, or to deal with it as a writ coming to him on that day as an officer. He may be bound as an agent to deliver it to the sheriff, or to treat it as delivered when he can act. But this is a personal, not an official, contract; it is a mere bailment which binds him, probably as a man, but does not bind him as a sheriff, and if he choose to disregard it entirely he is not bound as an officer. 13 *Cal.* 341, 342.

SEC. 53. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ—no special circumstances being shown.

SEC. 54. A deputy sheriff who seizes property under an attachment, is not authorized by virtue of his office to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. 12 *Cal.* 412.

When the Lien takes Effect.

SEC. 55. Attachments do not bind the property of the defendant from the time of the issuance, but only from the time of the actual levy. 13 *Cal.* 341.

SEC. 56. They are effectual to change the title of personal property from the time of levy. 14 *Cal.* 50.

SEC. 57. The attachment first levied by our statute has the priority. 13 *Cal.* 341.

SEC. 58. The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment, and the deposit of a copy of the writ, together with a description of the land attached, with the county recorder. 11 *Cal.* 238.

SEC. 59. Plaintiff, January 10th, 1858, in a suit entitled "C. & M. *et al.*, composing the Wisconsin Quartz Mining Co.," a corporation attached to a quartz mill and ledge belonging to the corporation. June 26th, 1858, the complaint was amended so as to make the corporation, as such, the party defendant, and judgment was rendered against the company August 14th, 1858, the property sold, and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858, sale October following, W. the purchaser. Defendants were in possession under sheriff's sale on the decree. Plaintiff derived title under his judgment and sale. It was held, that he could not recover; that he acquired no lien by his attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's right only attached from the date of his judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants claimed the latter had the better right. 16 *Cal.* 403.

Contests between Attaching Creditors.

SEC. 60. In contests between attaching creditors the rule: "*Qui prior est in tempore, potior est in jure,*" prevails. 6 *Cal.* 297.

SEC. 61. In such contests all the equities are in favor of the most diligent, and an irregularity cannot be taken advantage of by a stranger to the action in which it occurs. The subsequent execution or attachment creditor can claim no equitable relief. If the proceedings of the prior creditor are not void, but voidable, the defendant can alone object. 8 *Cal.* 573.

SEC. 62. A junior attaching creditor cannot take advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor. 18 *Cal.* 152.

SEC. 63. Whatever irregularities may exist in the proceedings of an attaching creditor, it is a well-settled rule that other attaching creditors cannot make themselves parties to those proceedings for the purpose of defeating them

on that account (18 *Cal.* 154), as where the irregularity consisted in the omission of the plaintiff to make affidavit of his debt before suing out the writ of attachment; in the omission to give the requisite bond; in giving the attachment bond in double the debt, instead of double the damages or sum sued for; in the omission to return the attachment bond, and in giving an insufficient bond. 18 *Cal.* 155.

SEC. 64. But where an attachment is based on a fraudulent demand, or one which has in fact no existence, it is otherwise, as will appear from a review of the action of courts of a higher order of learning and ability. 18 *Cal.* 154.

SEC. 65. An action was commenced by attachment to recover an alleged indebtedness, and defendants made default; before the entry of judgment, certain subsequent attaching creditors intervened and contested the validity of the plaintiff's attachment, on the ground that no debt was really due from defendants to plaintiff. On the issue thus raised the court found in favor of the intervenors, and thereupon entered an order setting aside the attachment of plaintiff. It was held, that the order was erroneous in entirely setting aside the plaintiff's attachment, and must be modified so as merely to postpone the plaintiff's lien to that of the intervenors. 21 *Cal.* 281.

SEC. 66. In some cases, third parties have been allowed to intervene where the debtor was shown not to be subject to the process, or the defendant's property not so subject. But, if the defendant does not insist upon the statutory steps being taken in the matter of a bond or affidavit, in the proper form, a creditor cannot interfere, any more than in the case of a judgment rendered upon an insufficient complaint, or otherwise irregular and reversible. 18 *Cal.* 155.

SEC. 67. In an attachment suit, judgment creditors of defendant may intervene to set aside the attachment because void as to them. 18 *Cal.* 378.

SEC. 68. The case of *Davis* vs. *Eppinger* was a proceeding by attachment to recover the amount of a promissory note executed by the defendant, Eppinger. The note was drawn payable one day after date without grace, and the suit was commenced on the day following its execution. The

attachment was issued at the commencement of the suit, and levied upon all the property of which Eppinger was the owner. A petition of intervention was filed by certain judgment creditors of Eppinger, seeking relief against the attachment. The supreme court say: If the intervenors have any rights in the premises, we are satisfied that they have pursued the proper remedy. On this point it is only necessary to refer to previous decisions of this court in which the subject has been fully considered. *Yuba County* vs. *Adams*, 7 Cal. 35; *Dixey* vs. *Pollock*, 8 Cal. 570. The point in relation to the commencement of the suit has also been settled by this court, and there is no doubt that the action was prematurely brought. *Wilcombe* vs. *Dodge*, 3 Cal. 260; *McFarland* vs. *Pico*, 8 Cal. 626. The only question of importance is whether the plaintiff acquired by his attachment a valid lien upon the property of Eppinger. If he did not, the intervenors are undoubtedly entitled to relief, and our opinion, upon a careful examination of the question, is that he did not. He relies upon the case of *Patrick* vs. *Montader* (18 Cal. 434), but in doing so he evidently overlooks the essential elements of that case. There the debt was held to be equitably due, and the decision was placed expressly upon that ground. It was admitted "that an attachment is, at least, *prima facie*, void as against another attachment, where the first is issued before the maturity of the debt." But as the debt in that case was equitably due, the court would not interfere to deprive the creditor of his advantage. His suit had been improperly brought, but he was entitled to the benefit of the equities in his favor. This is all that was decided; and in what particular the two cases can be regarded as analogous we are unable to perceive. In this case the debt was not due either legally or equitably, and the pretensions of the plaintiff are based upon the bold proposition that the validity of the attachment cannot be impeached upon that ground. This proposition is not supported by any of the authorities, and we are aware of no principle upon which it could be maintained. Drake, in his work on attachment (Sec. 778), lays down the doctrine broadly, that "where an attachment appears to have issued on a debt not due, it will be set aside

in favor of a junior attachment upon a debt that was due." In *Pierce* vs. *Jackson* (6 Mass. 242), the court said: "If the plaintiff, when he caused the attachment to be made on his writ, had no cause of action, he cannot claim the benefit of his attachment against a creditor having a good cause of action." In *Swift* vs. *Crocker* (21 Pick. 241), the language of the court was equally emphatic: the question being whether the claim of the plaintiff was due and payable at the time of instituting the suit. "If not," said the court, "the subsequent attaching creditors will sustain their petition, and the attachment by the plaintiff must be dissolved." In *Smith* vs. *Gettinger* (3 Geo. 140), a similar question was presented, and the same conclusion arrived at; and in *Hale* vs. *Chandler* (3 Gibbs, 531), the court said: "It is established by a uniform course of decisions in this court, that to entitle a party to commence a suit in attachment, he must have a present cause of action at the time he makes his affidavit, and sues out his writ." The controversy was between creditors, and an attachment issued before the maturity of the debt was set aside. We might refer to many additional authorities, but they proceed upon the same ground, and it is therefore unnecessary to do so. The universal language of the cases is, that an attachment issued upon a debt not due, is void as against creditors whose rights are injuriously affected by it. In other words, an attachment so issued has always been regarded as a fraud upon the rights of such creditors. We accord to this doctrine our unqualified approval, and consider it decisive of the present case. 18 *Cal.* 380–382.

Garnishment.

SEC. 69. All persons having in their possession or under their control, any credits or other personal property, belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff or constable, liable to the plaintiff, for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied. *Pr. Act*, 127; *Gen. Laws*, 5067, 5486.

SEC. 70. The one hundred and twenty-seventh section makes the garnishee liable to the plaintiff in the attachment suit for the amount of such property, unless the same be delivered up or transferred to the sheriff. Under the provisions of this section, the garnishee may protect himself from all further liability by delivering the property to the sheriff. This is a right which may be voluntarily exercised by the garnishee. If he delivers to the sheriff any property, he cannot be made further responsible for the property delivered. 9 *Cal.* 266.

SEC. 71. The doctrine of garnishment is part of the common law derived from the custom of London, and although it is here partially regulated by statute, it is not the less a common-law proceeding. 5 *Cal.* 294.

SEC. 72. The garnishee is regarded by the law somewhat in the light of a trustee, and is bound to protect, by legal and appropriate steps, the rights of all parties to the goods or credits attached in his hands; and if, after notice, though execution may have been awarded against him, he shall satisfy the judgment, it will be in his own wrong, and constitutes no valid defense to the claim of the assignee. The garnishee, knowing the facts, should set them up in some way, in resistance to the proceeding; if necessary, perhaps, he might file an interpleader for his protection, or at least, appeal from the irregular and unauthorized judgment. 11 *Cal.* 350.

SEC. 73. A garnishee can only be required to answer as to his liability to the debtor defendant at the time of the service of the garnishment. The garnishment is an attachment of existing debts, and what does not exist cannot be attached. 4 *Cal.* 410.

SEC. 74. From the very nature of a promissory note it is evident that, before its maturity, the indebtedness of the maker thereon cannot be the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. From its negotiability it may often pass into the possession of parties entire strangers to the maker, and even if held by the defendant at the time of garnishment it does not follow that it would be in his hands at its maturity, and, if transferred before maturity to a

bona fide holder, it could be enforced, even if paid upon the attachment. It follows, that the notice of attachment served upon the maker of a note, previous to its maturity, does not operate as a garnishment of the amount in his hands. Nor would the notice, served subsequent to the maturity, have any greater effect unless the note was at the time in the possession of the defendant, from whom its delivery could be enforced on its payment upon the attachment. 10 *Cal.* 340.

SEC. 75. A justice may render judgment against a garnishee for a sum within his jurisdiction, though the garnishee's indebtedness to the defendant exceeds the justice's jurisdiction. 19 *Mo.* (4 Bennett) 201.

SEC. 76. A plaintiff who has sued out an attachment and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property, and bring suit for the value of the property against the garnishee. 9 *Cal.* 262.

SEC. 77. If a statute gives a particular remedy in conferring a new right, then the particular remedy must be pursued. But in this case a new right was created, but no practicable remedy prescribed. 9 *Cal.* 267.

SEC. 78. In the case of *McFadden et al.* vs. *O'Donnell*, the plaintiff sued defendant on indebtedness for work, etc. Before the commencement of this suit, one Webster sued McFadden and got out attachment, upon which O'Donnell was garnisheed as the debtor of McFadden, the plaintiff. Webster recovered judgment against McFadden, but proceeded no further. After the commencement of this suit McFadden paid Webster his debt. This matter of the garnishment was insisted on by O'Donnell as presenting a bar or matter of abatement to this action. The supreme court say: This is not its legal effect. The mere attachment of the debt did not destroy the relations of debtor and creditor between McFadden and O'Donnell. It gave a right to Webster to subject the debt to the payment of his claim; but this right might be waived, or it might be destroyed by the payment of the debt by McFadden. It is true O'Donnell could not safely pay McFadden as long as this proceeding was in

force; and the court will not compel him to do so, since that would subject him to a double payment in the event of the attaching creditors obtaining judgment. But the court may act in perfect consistency with the rights of all the parties. The proper course is to order a suspension of action by the original creditor until the proceedings of the attachment creditor are disposed of. This order of suspension is enough to secure the rights of all concerned. If the mere pendency of the garnishment worked a disability to sue, the plaintiff might be unreasonably delayed, and, by one or more collusive proceedings, the statute of limitations might bar the claim. This doctrine is thoroughly discussed in the case of *Crawford* vs. *Slade* (9 Ala. 887), and the cases cited. It is true that some authorities of great weight seem to announce a different rule; but we think the better and more equitable principle is as we have stated it. 18 *Cal.* 164.

Form of Garnishment.

SEC. 79. The following is a form of garnishment:

Justice's court, ... township.

To ....

You are hereby notified, that all the debts owing by you to the within-named defendants or either of them, and all the credits, and all other personal property in your possession or under your control, belonging to the said defendants or either of them, or so much thereof as will satisfy the plaintiff's demand, to wit: .... dollars, gold coin of the United States, besides .... dollars costs, and also all accruing costs; and that .... shares of the capital stock, and all the interest of said defendants or either of them therein, of the .... gold and silver mining company, of which you are the secretary, standing in the name of said defendant on the books of said company, and that the real property, a description whereof is hereunto annexed, and any interest therein, belonging to the said defendants or either of them, are attached, in pursuance of the writ of attachment, of which the within is a true copy.

And you are hereby notified not to transfer, pay over or deliver, the same to any one but myself.

Please furnish a statement.

Dated this .... day of ....., A.D. 18 ..

....,

Constable ..... township.

Examination of Defendant and his Debtor or Bailee.

SEC. 80. Any person owing debts to the defendant, or having in his possession or under his control any credits or

other personal property belonging to the defendant, may be required to attend before the justice, or a referee appointed by the justice, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The justice may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff or constable on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof. *Pr. Act*, 128; *Gen. Laws*, 5068, 5486.

SEC. 81. The provisions of sections one hundred and twenty-seven and one hundred and twenty-eight were intended to secure the property after the lien has attached. If, therefore, this object is already secured, the court from which the attachment issues will not proceed any further. The court issuing the attachment has the power in proper cases to order the property to be delivered to the sheriff. But this discretion must be soundly exercised. 9 *Cal.* 28, 29.

SEC. 82. But the provisions of the one hundred and twenty-eighth section were intended for the security of the plaintiff, who may cause the garnishee to appear and answer under oath; and the court or judge may require the delivery of the property to the sheriff. The plaintiff may not be willing to trust to the personal responsibility of the garnishee pending the attachment proceedings, and may have the best reasons for demanding the delivery of the property to the sheriff. This section, however, was not intended to confer a privilege upon the garnishee. The privilege of examination on oath is for the security of the plaintiff and not of the garnishee. If the statement of the garnishee constituted the measure and limit of his liability, then he would have the right to insist upon it as a condition precedent to any suit against him. It follows, that the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and that the liability of the garnishee will not be affected by the failure of the plaintiff to take such

a step. If he is willing to rely upon the responsibility of the garnishee and upon other testimony to prove the facts as to the property, he has the right to do so without releasing the garnishee. 9 *Cal.* 266.

SEC. 83. Where a garnishee, in discharge of a rule, answers under oath, that he was released by the plaintiff from his obligation to answer, and that the plaintiff had abandoned his examination, he should be discharged by the court without further delay, unless his answer is controverted by the affidavit of the plaintiff. And while a party is garnisheed to answer on a certain day, and appears, and the summoning party declines, or is not prepared to take his answer, and a term elapses without any action on the garnishment, the summons is discontinued, and the party discharged from liability to answer. This rule results from the peculiar relationship of the garnishee to the action. He at first partakes more of the character of a witness than a party; and as well might a witness be expected forever to appear because of one summons for a certain day. The business relations of men, who thus become incidentally connected with the litigation of others, cannot be allowed to be indefinitely suspended on account of the gross laches of those others. 3 *Cal.* 254.

Form of Order of Examination of Defendant.

SEC. 84. The following is a form of order of examination of defendant:

In the justice's court of .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

The people of the state of .....,

To ...., greeting:

Whereas, it has been alleged and made to appear to the undersigned, justice of the peace of said township, that an attachment has been duly issued out of this court against your property and is still in force, and that you have in your possession or under your control certain debts, moneys, effects, credits and other property, owing to or belonging to you:

You are therefore commanded to be and appear before me, at my office in said township in said city and county, on the .... day of ...., A.D. 18.., at

.... o'clock ...., then and there to be examined on oath concerning the same; and you are further commanded not to pay, transfer, return or otherwise part with or dispose of, any such debts, moneys, effects, credits or other property, until duly released according to law.

Given under my hand, this .... day of .... A.D 18..

....,
Justice of the peace of said township.

Form of Constable's Certificate of Service.

SEC. 85. The following is a form of constable's certificate of service to be indorsed on the foregoing order:

I hereby certify that I have served the within order, by delivering a true copy thereof to ...., the defendant therein named, personally, this .... day of ...., A.D 18.., at .... township, county of ....

....,
Fees, $.... Constable.

Form of Order of Examination of Debtor of Defendant.

SEC. 86. The following is a form of the order of examination of debtor of defendant:

In the justice's court of .... township, in the county of ...., state of ....

....,
plaintiff,
against
....,
defendant.

The people of the state of .....,

To ...., greeting:

Whereas, it has been alleged and made to appear to the undersigned, one of the justices of the peace of said township, that an attachment has been duly issued out of this court against the property of the defendant in the above-entitled action and is still in force, and that you have in your possession or under your control certain debts, moneys, effects, credits and other property, owing to or belonging to the said defendant:

You are therefore commanded to be and appear before me, at my office in said township in said .... county, on the .... day of ...., A.D. 18.., at .... o'clock ...., then and there to be examined on oath concerning the same; and you are further commanded not to pay, transfer, return or otherwise depart with or dispose of, any such debts, moneys, effects, credits or other property, until duly released according to law.

Given under my hand, this .... day of ...., A.D. 18..

....,
A justice of the peace of said township.

Form of Constable's Certificate of Service.

SEC. 87. The following is a form of constable's certificate of service to be indorsed on foregoing order:

I hereby certify that I have served the within order, by delivering a true copy thereof to ...., the person to whom the same is directed, personally, this .... day of ...., A.D. 18.., at .... township, in the county of ....,

Fees, $.... Constable.

Inventory of Property Attached.

SEC. 88. The sheriff or constable shall make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he shall request, at the time of service, the party owing the debt or having the credit, to give him a memorandum stating the amount and description of each; and if such memorandum be refused, he shall return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit. *Pr. Act*, 129; *Gen. Laws*, 5069, 5486.

Constable's Return of Writ.

SEC. 89. The sheriff or constable shall return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto. The provisions of this chapter shall not apply to any suits already commenced, but so far as such suits may be concerned, the act entitled an act to regulate proceedings against debtors by attachment, passed April twenty-second, eighteen hundred and fifty, shall be deemed in full force and effect. *Gen. Laws*, 5081, 5486.

SEC. 90. A mistake in the date of the sheriff's return may be corrected at any time. Such lien cannot be divested by the failure of the sheriff to make a proper return of the writ. Nor is it necessary, when the levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied. Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained. 11 *Cal.* 238.

Form of Return of Writ of Attachment.

SEC. 91. The following is a form of return of writ of attachment:

I do hereby certify, that by virtue of the annexed writ of attachment, I duly attached real property belonging to the defendant named in said writ, of which the following is a description, viz [here describe the land attached]: by serving upon said defendant, personally [or, if there be two or more defendants, say: "by serving upon each of said defendants, respectively, personally"] in the county of ...., a copy of said writ, on the .... day of ...., 18.., at the hour of .... o'clock .... of that day.

I further certify, that I did, on the same day [or, "on the .... day of .... 18.."] file in the office of the recorder for said county of ...., a copy of said writ of attachment, together with a description of the property attached.

.... ,
Constable .... township.

SEC. 92. If a defendant cannot be found, but an occupant is found upon the land or other real property, the following form is sufficient:

I do hereby certify, that by virtue of the annexed writ of attachment, I duly attached real property belonging to the defendant named in said writ, of which the following is a description [here describe the property]; that said defendant could not be found, and I did not make personal service of said writ upon him, and that I did attach said real property by leaving a copy of said writ of attachment with ...., whom I found in the occupation of said real property, on the .... day of ...., A.D. 18.., at the hour of .... o'clock .... of that day.

I further certify, that I did, on the .... day of ...., A.D. 18.., file in the office of the recorder in and for said county of ...., a copy of said writ of attachment, together with a description of the property attached.

[Date.] ...., Constable .... township.

SEC. 93. If the defendant cannot be found, and if there be no occupant of the real property attached, the statute (*Pr. Act*, Sec. 127) directs that the property shall be attached by posting a copy [of the writ of attachment] in a conspicuous place on the said property, and filing a copy with a description of the property attached, with the recorder of the county. In such case the return of the officer should be as follows:

I hereby certify, that by virtue of the annexed writ of attachment, I duly attached real property belonging to the defendant named in said writ, on the .... day of ...., A.D. 18.., at the hour of .... o'clock, ... of that day, of which the following is a description [here describe the property]: that said defendant could not be found and there was no occupant upon the property,

and I attached the same by posting a copy of said writ [describe the place or thing on which you posted it], it being a conspicuous place on said property.

And I further certify, that I did, on the .... day of ...., A.D. 18.., file in the office of the recorder for the said county of ...., a copy of said writ of attachment, together with a description of the property attached.

....,

[Date.] Constable .... township.

SEC. 94. If the writ of attachment be levied on personal property, the following form of return is sufficient:

I do hereby certify that by virtue of the within writ of attachment, I did, on the .... day of ...., A.D. 18.., at the hour of .... o'clock .... of that day, duly attach the following personal property, belonging to the defendant named in said writ, by taking the said property into my custody and by serving on said defendant personally a copy of said writ, in the county of .... The following is a description of the property by me attached [here give an inventory of the property].

....,

[Date.] Constable .... township.

SEC. 95. If the property levied on be both real and personal, a certificate embracing the first and last preceding forms will be sufficient.

SEC. 96. If the constable is required by the writ to levy on property in the possession of third persons, but belonging to the defendant, the form of return may be as follows:

I do hereby certify, that by virtue of the annexed writ I duly attached all moneys, goods, credits, effects, debts due or owing, and all other personal property belonging to the defendant therein named [or, if there be more than one, "to the defendants therein named," or, "to either of them"] in the possession or under the control of the party [or, "parties"] hereinafter named, by serving upon him personally [or, "upon each of them respectively, personally"], in the county of ...., at the time set opposite his name [or, "at the times set opposite their respective names"], a copy of said writ, with a notice in writing, that such property was attached in pursuance of said writ, and not to pay over or transfer the said property to any one but myself.

[Statements demanded. Answers as hereinafter mentioned.]

Names.	*Time of Service.*	*Answers.*
....	.... 18..	I have .... gold watches, ... bay horses, and .... hundred dollars.

....,

[Date.] Constable .... township.

[In either case, the return should be attached to the writ, which avoids the necessity of formally entitling the case in which the attachment issued, at the commencement of it.]

Duty of Constable with Respect to Property Attached.

SEC. 97. If any of the property attached be perishable, the sheriff or constable shall sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him if the same can be done without suit. The constable's receipt shall be a sufficient discharge for the amount paid. *Pr. Act*, 130; *Gen. Laws*, 5070, 5486.

SEC. 98. If judgment be recovered by the plaintiff, the sheriff or constable shall satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1st. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

2d. If any balance remain due and an execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales shall be given and the sales conducted as in other cases of sales on execution. *Pr. Act*, 132; *Gen. Laws*, 5072, 5486.

SEC. 99. The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it. 9 *Cal.* 538.

SEC. 100. Where a party, by the mistake of his attorney, took judgment on his attachment for too much, and within thirty days after the issuing of the execution went to the defendant and offered to correct the error, it was held that this mistake did not avoid the debt or writ. Overruling 7 *Cal.* 355. 13 *Cal.* 442.

SEC. 101. The application of an attaching creditor to compel the sheriff or constable to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving, to the other attaching creditors, it is the duty of the sheriff or constable to do so if he wishes the decision to bind them. 8 *Cal.* 570.

SEC. 102. If after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff or constable shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff or constable upon reasonable demand shall deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment. *Gen. Laws*, 5073, 5486.

Claims by Third Persons.

SEC. 103. If any personal property attached be claimed by a third person as his property, the sheriff or constable may summon a jury of six men to try the validity of such claim; and such proceeding shall be had thereon, with the like effect, as in case of a claim after levy upon execution. *Pr. Act*, 131; *Gen. Laws*, 5071, 5486.

SEC. 104. The owner of property attached or levied upon as the property of another, is not conclusively estopped from showing title in himself because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known to the officer his claim at or before the time the receipt is given. But if he fails to make his claim known, and thus influences the conduct of the officer, he is estopped from afterwards asserting it: *provided*, that the facts and circumstances relating to his claim were then known to him. The admission that the property was attached or levied upon as the property of the debtor, and the promise of the owner

to deliver it to the officer, must constitute *prima facie* evidence of ownership in the debtor; and, unless overcome by proof on the part of the claimant, must be decisive against him. To overcome this *prima facie* ownership in the debtor, the receipter must prove two things: 1st. That he claimed the property. 2d. That it was in fact his own. 10 *Cal.* 177, 178.

The Indemnity Bond.

SEC. 105. Where property attached is claimed by a third person, the sheriff may protect himself before a jury of six persons, and if the verdict be in favor of the claimant, he may relinquish the levy, unless indemnified. If he gives the indemnity, it will only inure to the benefit of the owner of the property, so far as the consequences which result from his own acts are concerned. An indemnity bond to the sheriff to retain property seized under attachment, is an instrument necessary to carry the power to sue into effect. 8 *Cal.* 227.

SEC. 106. Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterwards the party claiming the property obtained judgment against the sheriff for the value of the property, it was held, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. In such case, the attaching creditors do not stand in the position of joint trespassers—the seizure of the second being subject to the first. The sheriff was the separate agent of both attaching creditors, but in the order stated, and as he disposed of the property to the benefit of the first alone, he must look to him and not the second attaching creditor. 8 *Cal.* 227; 13 *Cal.* 521.

SEC. 107. So, where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. 13 *Cal.* 521.

Form of Indemnity Bond.

SEC. 108. The following is a form of bond of indemnity against a levy:

Know all men by these presents: That we, ..., ..., ..., ..., are held and firmly bound unto ...., sheriff of the county of .... and state of ...., in the sum of .... dollars, to be paid to the said .... or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the .... day of ...., in the year one thousand eight hundred and seventy .....

Whereas, ... has issued an execution on a judgment in the .... court in his favor, against ...., for .... dollars to the said .... as sheriff of .... county.

Now, therefore, the condition of the above obligation is such, that if the above bounden .... shall well and truly keep and save harmless and indemnify the said ...., sheriff as aforesaid, and all and every person and persons aiding and assisting him in the premises, of and from all harm, loss, trouble, damages, costs, suits and actions, judgments and executions, that shall or may at any time arise, come or be brought, against him, them or any of them, as well for the levying and making sale under and by virtue of such process, of any of said goods, as for entering any shops, stores, dwelling or other houses or buildings, for the purpose of taking said goods and chattels; and shall pay off, cancel and discharge, any judgment, claim or demand, that may be recovered, arise or be made, against the said ...., as such sheriff, or of the said persons so aiding or assisting or either of them, then this obligation to be void, otherwise to remain in full force.

.... [L.S.]
.... [L.S.]
.... [L.S.]
.... [L.S.]

[To be signed, and justification and certificate of acknowledgment, as in SURETIES, Sec. 11.]

Discharge of Attachment after Levy.

SEC. 109. Whenever the defendant shall have appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the justice in whose court the action is pending or to a county judge, for an order to discharge the attachment wholly or in part, and upon the execution of the undertaking mentioned in the next section, such order may be granted, releasing from the operation of the attachment any or all of the property attached, and all of the property so released and all of the proceeds of the sales thereof [shall] be delivered to the defendant, upon the justification of the

sureties on the undertaking, if required by the plaintiff. *Gen. Laws*, 5076, 5486.

Undertaking on such Discharge.

SEC. 110. Before the granting such order the justice shall require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders or householders in the county, to the effect that in case the plaintiff recover judgment in the action defendant will, on demand, re-deliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The justice granting such release may fix the sum for which the undertaking shall be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by three disinterested persons to be appointed for that purpose. The sureties may be required to justify before the justice, and the property attached shall not be released from the attachment without their justification, if the same be required. *Gen. Laws*, 5077, 5486.

SEC. 111. If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and fifty-four or section one hundred and thirty-seven, or he may proceed as in other cases upon the return of an execution. *Gen. Laws*, 5074, 5486.

SEC. 112. Where the sheriff under a writ of attachment in a suit of plaintiff against D. M. E. and P. M. E., as the firm of D. M. E. & Co., was about to levy upon the property of said firm, and a bond was executed by L. and J. as sureties, conditioned to keep harmless and indemnify the sheriff against all damages, costs, charges, trouble and expense, he may be put to by reason of the non-seizure of the property, and also "to pay whatever judgment may be rendered against said defendants," and judgment was obtained against one only of the defendants—plaintiff failing on the trial to prove the other to be a partner—it was held, that the sureties are liable on the bond for the amount of the

judgment; that the bond, though not strictly an undertaking under the statute, conformed substantially to its requirements, and must be read by the light of the statute and interpreted according to the intention of the parties. Such bond will be presumed to have been executed with reference to the provisions of the statute, and as the security required by the statute is a security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants satisfies the condition "to pay whatever judgment may be rendered against said defendants." 17 *Cal.* 433, 434.

SEC. 113. If the defendant obtains an order for the release of property attached in the action by delivering to the court or judge an undertaking, executed by sureties, conditioned to pay the plaintiff any judgment he may recover in the action, the property is thereupon released. Whenever the liability of the sureties is fixed by the rendition of a judgment in favor of the plaintiffs the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same the sureties are discharged from their obligation on the undertaking. 26 *Cal.* 535.

SEC. 114. In the case of *McMillan* vs. *Dana*, the plaintiff brought suit upon this undertaking:

"*Robert McMillan* vs. *Garret N. Vischer*—

"Whereas, the above-named plaintiff has commenced an action in the aforesaid court against the above-named defendant for the recovery of six thousand four hundred dollars, and whereas an attachment was duly issued and served, as will more fully appear by the sheriff's return on the process in said case:

"Now, therefore, we the undersigned residents of the city and county of San Francisco, in consideration of the premises, and in consideration of the release from attachment of the property attached as above-mentioned, do hereby jointly and severally undertake in the sum of twelve thousand and eight hundred dollars, and promise to the effect that if the plaintiff shall recover judgment in such

action, we will pay to the plaintiff, upon demand, the amount of such judgment, together with the costs, not exceeding in all the said sum of twelve thousand eight hundred dollars.

"Dated at San Francisco this 8th day of December, 1857.

"[Signed] WM. A. DANA,

"IRA P. RANKIN."

The complaint averred that after the execution and approval by the court of this paper, and in consequence and consideration of such undertaking, the said property and moneys so attached were released from said attachment, "as by the order of said court, made by the judge thereof, and filed in said court." The order of the court was set out which released and discharged the property attached from the attachment. The court on the trial granted a nonsuit, upon the ground that there was no averment in the complaint that the property attached was actually released. The supreme court say: The undertaking has the same effect and is to be construed in the same way as if it were a bond making the same recitals. The mere fact that the statute does not require a seal to the paper evidencing the obligation in this class of instruments, does not require us to give them a different character or construction from those executed under the old practice, which were technically writings obligatory. The recitals are conclusive of the facts stated. They show a consideration for the promise, and the obligation of the parties upon that consideration. In the present instance, the defendants promise, in consideration of the release of the property from the attachment, that in the event of a recovery of the judgment by the plaintiff, they will pay the amount of the judgment. The complaint avers that this property was released by order of the judge, and the order of release is set out. The object of giving the undertaking was to procure this release, and this release was had in consequence of the undertaking; and the consideration of the undertaking therefore is the release so procured. In consideration of this release, the obligors agree to pay the judgment. Whether the property was redelivered to Vischer or not, was wholly immaterial. The plaintiff in attachment, after the giving of the under-

taking and the order of the judge, had no further claim on it. Nor does it matter whether the property was subject to attachment or not. That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that these sureties procured its release upon the stipulation that, in consideration of such release, they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit. Nor was any proof necessary of the preliminary proceedings connected with or preceding the levy, for these defendants admit the levy of the attachment on this property, and this is enough.

On petition for a rehearing, the supreme court say: 1st. The expressions of the opinion are to be limited to the case before the court. When we spoke of the effect of an undertaking as similar to that of a bond, we spoke, of course, of an undertaking taken in pursuance of the statute —for it was of a statutory undertaking that the observations were made. The record presented the question upon the complaint, which averred that the undertaking was made after an attachment, upon the order of the judge.

Whether a mere formal variation from the regular statutory course would make any difference in the rule, it is not necessary to determine, for no point was made or fact alleged as to such variation.

2d. We think that it does not rest with the defendant to say that the property attached, if any was, was not subject to levy, for the condition is to answer the judgment; and no collateral inquiry can be made as to the fact of the levy or the property being subject to it. This has been often decided in the case of forthcoming bonds in several states of the union. It is not uncommon in Kentucky, Virginia and Alabama, to give bonds for the delivery of property merely fictitious in order to stop the execution of a *fi. fa.;* but it has been held that the parties executing the bond were estopped to deny that the property was levied on and subject to levy. The condition here is, that the obligors will pay the judgment in consideration of the discharge of the attachment; and if the undertaking be regular it is not at all important whether the property be leviable or not,

for by the contract the parties have bound themselves to pay in an event independent of all considerations of this sort.

3d. What we said in reference to the conclusive effect of the recitals, was upon the hypothesis that this was a statutory undertaking; and to that opinion we adhere. The question fairly arose upon the pleadings, and our judgment upon that matter remains unaltered. 18 *Cal.* 346–349.

Form of Undertaking on such Discharge.

SEC. 115. For form of undertaking on such discharge, see section thirty-five.

Discharge of Attachment for being Improperly or Irregularly Issued.

SEC. 116. The defendant may, also, at any time before the time for answering expires, apply, on motion, upon reasonable notice to the plaintiff, to the justice in whose court the action is brought or to a county judge, that the attachment be discharged, on the ground that the writ was improperly or irregularly issued. *Gen. Laws*, 5078, 5486.

SEC. 117. The notice of motion to discharge a writ of attachment, stated that the motion would be made because the said writ was improperly issued: *Held*, that the notice should have specified the grounds of the motion, and wherein it would be urged that the writ was improperly issued. The notice gave no information to the adverse party as to the character of the objections which would be taken. 10 *Cal.* 338.

Section one hundred and thirty-eight does not obviate the necessity of specifying the particular points of irregularity upon which the motion will be made. It is only a provision that whenever the writ is improperly issued, that fact will authorize the application for its discharge. It is like a great variety of provisions indicating the general ground or reason upon which parties may proceed or the action of the court may be based, and which are never held to obviate the necessity of specifying the points of objection upon which the moving party will rely. If the point be stated, it may be possible for the opposite party to

answer it, and the object of the rule is to give him a fair opportunity to do so. 10 *Cal.* 338, 339.

SEC. 118. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made. *Gen. Laws*, 5079, 5486.

SEC. 119. If, upon such application, it shall satisfactorily appear that the writ of attachment was improperly or irregularly issued, it shall be discharged. *Gen. Laws*, 5080, 5486.

Suits against Plaintiff in Attachment.

SEC. 120. If a person having a good cause of action against another, willfully sue for a much greater amount than is due, and attach the property of the other, and put him to charges, he is liable. In cases of this nature there is no settled rule as to the amount of damages to be recovered. The jury are not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration the character and position of the parties, and all the circumstances attending the transaction. 6 *Cal.* 685.

NOTE.—For further information, see EXECUTION, Chap. XLVIII, and SHERIFFS, Chap. LXXXI.

CHAPTER XXXI.

ATTORNEYS AT LAW.

SECTION 1. The authority of an attorney at law to appear for parties for whom he enters an appearance in an action, will be presumed, where nothing to the contrary appears. 21 *Cal.* 51.

SEC. 2. Attorneys are officers of the court, and it is its highest duty to see that its own officers conduct themselves properly. 8 *Cal.* 322.

SEC. 3. An attorney, by virtue of his retainer and general control over a cause in court, has the power to bind his client, by consenting to an order of the court; and in case

of such consent being given by the attorney, it cannot, after the order has been made, be revoked by the client. 1 *Cal.* 214.

SEC. 4. Where a party changes his attorneys in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record. 6 *Cal.* 55.

SEC. 5. An attorney has no lien upon a judgment recovered in favor of his client as a compensation for his services; and where the plaintiff enters satisfaction of a judgment, the attorney has no right to disturb it. 2 *Cal.* 509.

SEC. 6. An attorney at law, appointed by the court of sessions to defend a pauper prisoner arraigned before it upon an indictment for felony, cannot charge the county for his professional services; the appointment being made upon the expression of a desire of the prisoner to have counsel. 17 *Cal.* 61.

CHAPTER XXXII.

PROMISSORY NOTES, BILLS OF EXCHANGE, ORDERS, CHECKS, DRAFTS, CERTIFICATES OF DEPOSIT.

	SECS.
DEFINITION	1- 9
NEGOTIABLE PAPER—WHAT IS?	10–16
OF THE CONSIDERATION—WHAT GOOD	17–18
OF FRAUD, FAILURE OR ILLEGALITY OF CONSIDERATION	19–28
NOTE DEPOSITED AS COLLATERAL SECURITY	29–32
WHEN INTEREST BEGINS TO RUN	33
WHEN THE RECEIPT OF NOTE IS PAYMENT OF A DEBT	34–39
ALTERATION IN A NOTE	40–42
PAYMENT OF NOTE	43–47
WHEN NOTE OR DRAFT IS PAYABLE	48–50
OF THE PLACE OF PAYMENT	51–52
WHEN THE CHECK MUST BE PRESENTED	53
DEMAND UPON THE MAKER	54–61
INDORSER, HIS CONTRACT	62–65
INDORSER, WHEN CHARGED AND NOT CHARGED	66–71
NOTICE TO INDORSER, WHEN TO BE GIVEN	72–78
NOTICE TO INDORSER, HOW SERVED	79–81
NOTICE TO INDORSER, FORM OF	81–87
ACCEPTOR OF BILL	88–95
PROTEST OF NOTARY	96–101
WAIVER OF PRESENTMENT AND NOTICE, HOW PROVED, AND EFFECT OF	102–104
DAMAGES ON FOREIGN BILLS	105
GUARANTORS	106–113
SURETIES	114–116
WHEN SURETY RELEASED	117
ACTION BY SURETY AGAINST MAKER	118
WHOM AND BY WHOM SUIT CAN BE BROUGHT ON NOTE	119–127
PAST NOTE OR CHECK OR NEGOTIABLE PAPER	128–139
DEFENSES BY MAKER AGAINST ASSIGNEE	140
EXECUTION OF NOTE, HOW PROVED	141
NOTES AND BILLS EXECUTED BY AGENT	142–146
NOTES AND BILLS EXECUTED BY CORPORATIONS	147–148
NOTES AND BILLS EXECUTED BY INFANTS	149
NOTES AND BILLS EXECUTED BY PARTNER	150–152
NOTES AND BILLS EXECUTED BY TRUSTEES, GUARDIANS	153
NOTES AND BILLS EXECUTED BY WIFE	154–156
FORMS OF NOTES, ETC.	157–166

SECTION 1. A promissory note is a direct engagement by the payor to pay his own debt. 16 *Cal.* 153.

SEC. 2. An instrument, to be regarded either as a bill of exchange or promissory note, must be payable absolutely; its payment cannot be made to depend upon a contingency. Therefore, warrants drawn by the mayor and controller upon the treasurer of a city, upon a particular fund, upon the sufficiency of which their payment is made to depend, are not analogous in legal effect to bills of exchange drawn by an

individual upon himself, and cannot be treated as promissory notes. 16 *Cal.* 286.

SEC. 3. The first and principal requisite of a bill of exchange is, that it must be for the payment of *money only*, and for a *named sum certain*. 8 *Cal.* 104.

SEC. 4. The following written order possesses all the requisites of an inland bill of exchange:

...., ..., 18..,

Mr. ....: Please pay the bearer of these lines ...., and charge the same to my account. .. ..

It contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified it is to be taken as payable at sight. No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "please" does not alter the character of the instrument. This is the usual term of civility, and does not necessarily imply that a favor is asked. 12 *Cal.* 97.

SEC. 5. There is little or no difference between checks, so called, and bills of exchange, except so far as that difference may arise from the custom of merchants, or the statute regulation of the particular jurisdiction in which they are used. They are similar in form and the courts have placed them upon the same footing. 4 *Cal.* 37.

$ ....

SAN FRANCISCO, June 9th, 1853.

Messrs. ...., bankers:

Pay to ...., on the fifteenth instant, or order, ... thousand dollars.

....

This instrument has all the attributes of a bill of exchange, and differs from an ordinary check, which is generally drawn payable at sight, and raises the supposition that the drawer has the amount of money in the hands of the drawee, which becomes at once appropriated for its payment. Checks of this kind are sight bills, and, under our statute, are not entitled to grace; but the above instrument, being an order to pay at a future day, is an inland bill of exchange, and the drawer is entitled to three days' grace and notice of non-payment. Therefore, the presentation for payment and notice of non-payment given to the drawer, and, consequently,

the commencement of the action on the fifteenth of June, were premature. 4 *Cal.* 37.

Form of Certificate of Deposit.

SEC. 6. The following is a form of certificate of deposit:

No. ....,
....; ....,
....., ..., 187..

.... deposited with us, ... hundred and .... dollars, payable at our office, in ....., on return of this certificate, with her indorsement herein.

$ ....

Certificates of deposit, although differing in form from a promissory note, yet have all of its important incidents. Each contains a promise by one person to pay another person, absolutely and unconditionally, a certain sum of money, at a time specified therein. The rules of law, in reference to all securities, ought to be applied according to the nature of the security, and not to be influenced by the name by which the paper is commonly known. Certificates of deposit must, therefore, be, as far as negotiability is concerned, placed upon the same footing as promissory notes, which were negotiable at common law and have been expressly made so by our statute. 4 *Cal.* 40.

SEC. 7. Bills of credit signify a paper medium, intended to circulate between individuals and between government and individuals, for the ordinary purposes of society, and embrace every description of paper which circulates as money. 7 *Cal.* 477.

SEC. 8. A note, written by a party beginning "I, A B, promise to pay," has been held good, though no name was written under it. So it has been held, that if a party request another in his presence to write his name for him, it is sufficient. 8 *Cal.* 573.

SEC. 9. The legal effect of a promissory note is the same, with or without the words, "value received." 8 *Cal.* 291.

Negotiable Paper, What is.

SEC. 10. All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person or to his order, or to the order of any other person, or

unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants. Every such note, signed by the agent of any person, under a general or special authority, shall bind such person, and shall have the same effect and be negotiable as above provided. The word "person" shall be construed to extend to every corporation capable by law of making contracts. The payees and indorsers of every such note payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned against the makers and indorsers of the same, respectively, in like manner as in cases of inland bills of exchange, and not otherwise. *Gen. Laws*, 422–425.

SEC. 11. Such notes, made payable to the maker thereof or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker and all persons having knowledge of the facts as if payable to the bearer. *Gen. Laws*, 426.

SEC. 12. Notes non-negotiable at common law are made negotiable with us by positive statute. True, the persons to whom such notes are transferred hold them subject to all defenses that might be urged in suits against the maker brought by the payee; but that fact is not inconsistent with an absolute ownership of the securities vested in the party to whom they may have been transferred. 24 *Cal.* 210.

SEC. 13. A warrant drawn by the auditor of a county upon the treasurer, although payable to "A or bearer," does not possess the quality of negotiable paper so as to make it transferable by delivery. 23 *Cal.* 125.

SEC. 14. A judgment is not a negotiable instrument like a bill of exchange by the law merchant. 18 *Cal.* 438.

SEC. 15. A draft or order by A on B to pay C or order the balance due A by B, is not a negotiable security, not being for any fixed sum, but if indorsed by B, "balance due, one thousand dollars," over his signature, it becomes a promise by B to pay C or his order that sum, and is negotiable. 8 *Cal.* 101.

SEC. 16. A bill of lading is not a negotiable instrument, like a bill of exchange. In this country no instruments are negotiable but regular promissory notes and bills of exchange. 1 *Cal.* 79.

Of the Consideration, What Good.

SEC. 17. An outstanding liability as surety or indorser for another, together with a contract or promise, express or implied, by such surety or indorser to the principal, that he will make the debt his own and pay it, and so indemnify the principal, is a good consideration for an express promise to pay an equal amount on demand. 13 *Cal.* 333.

SEC. 18. When an indorser has, either expressly or impliedly, undertaken to pay the note by him indorsed, such an undertaking is a good and valuable consideration for a promissory note. 13 *Cal.* 334.

Of Fraud, Failure or Illegality of Consideration.

SEC. 19. Notes given for a gaming consideration are valid in the hands of a *bona fide* indorsee. 2 *Cal.* 67.

SEC. 20. A check given for a gaming debt is void in the hands of all persons except a *bona fide* holder, without notice. 10 *Cal.* 523.

SEC. 21. With checks, as with promissory notes, the presumption is that they are given upon a valid consideration; but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration. 10 *Cal.* 526.

SEC. 22. Story, in his work on equity jurisprudence (Sec. 208), says that if a vendor sell an estate, knowing that there are incumbrances upon it of which the vendee is ignorant, the suppression of such a fact will be sufficient to avoid the sale upon the ground of fraud. This rule rests upon the soundest principles of equity and justice, and the courts have always been ready to enforce it by relieving the purchaser from the consequences of his bargain. Silence under such circumstances amounts to a fraudulent concealment, but the failure to speak cannot be regarded as fraudulent if the ignorance of the purchaser is attributable

to his own negligence. It is not the policy of the law to encourage laches, and if the means of information are known to the purchaser, and within his reach, he cannot afterwards allege his ignorance as a ground of fraud, unless by deceit or misrepresentation he has been actually misled. The seller has the right to act upon the presumption that he had informed himself of whatever he considered it his interest to know, and the courts will treat the transaction as a purchase made with full knowledge of the facts, and decline to interfere. A broader and more comprehensive equity is frequently administered in cases of specific performance, but in such cases courts of equity sometimes proceed upon grounds entirely independent of the validity of the contract. *Ward* vs. *Packard et al.*, 18 Cal. 391.

SEC. 23. When at the time a note is made, and as a part of the same transaction, a third person indorses an absolute guaranty upon the note, the note and the guaranty are but parts of the same instrument, the note expressing that which first applies to the maker, and the guaranty expressing that which applies only to the guarantor, while the note and guaranty taken together make up the contract as between the payee and the guarantor. It is competent for parties to refer to any writing for a given purpose, and writing for that purpose becomes a part of the instrument signed by the party to be charged; and it does not matter in what place or in what order the parties sign their names, the intention must govern. Where the guaranty is indorsed upon the instrument after it is made, and therefore constituted no part of the original instrument, the guaranty will fail, for the reason that there is either no consideration for the promise in fact, or the new consideration is not expressed in the instrument to which reference is made. 7 *Cal.* 34, 35.

SEC. 24. Want or illegality of consideration may be inquired into in a suit upon a bill or note between the original parties, by the general mercantile law, but where these securities have passed into the hands of third persons without notice, the maker is estopped from setting up such defense. This peculiar system of credit is favored by the law; and a rule requiring the indorsee of every bill or note

to inquire into the consideration would retard commercial transactions and shake paper credit to its foundation. 2 *Cal.* 66. The holder of a promissory note, coming fairly by it, has nothing to do with the original contract between the parties. Although money contracts were void at common law, for illegality, etc., of consideration, it is impossible to find a single case in which a note given for an illegal consideration has been held void in the hands of third persons, except by operation of statute. The want or illegality of consideration of a note transferred before due, cannot be shown in an action by a *bona fide* holder, except where the note is declared void by statute. 2 *Cal.* 67.

SEC. 25. A failure of consideration may be pleaded in bar of an action upon a promissory note, but to be available for that purpose the failure must be total. In cases of fraud or warranty, or where the consideration is divisible or capable of apportionment, a partial failure may sometimes be given in evidence in reduction of damages; but the practice in this respect proceeds upon the principle of a cross action, and an affirmative right of action must exist in favor of a party seeking relief in that form. 19 *Cal.* 149.

A partial failure of consideration is not a defense to an action on a promissory note or bill of exchange; but when properly pleaded it may be shown in reduction or recoupment of damages. In establishing the claim to a mitigation of damages, it is evident that the defendant must plead and show a cause of action against the plaintiff, and prove his case in the same manner as if he had elected to bring a separate action. 19 *Cal.* 149.

SEC. 26. The possession of a promissory note, whether obtained before or after maturity, is *prima facie* evidence of ownership. The averment of a valuable consideration for the transfer to the plaintiff is generally immaterial. The transfer, with or without value, confers upon the holder the right of action; and a consideration need not be proved, unless a defense is interposed which would otherwise preclude a recovery. 9 *Cal.* 246, 247.

An agreement for the extension of the time for the payment of the principal of a note, if without consideration, is void. It must confer rights which the holder does not already possess. 9 *Cal.* 247.

SEC. 27. If any portion of the consideration of a note be fraudulent, the entire note is void, as against creditors. 10 *Cal.* 229.

If a party by ante-dating a note and making it draw interest from date, secures to himself a certain sum of money not justly due to him for any past or present consideration, he takes that much from the other creditors, and they are just as much injured as if that amount had been included as part of the principal sum itself. The result is the same though the mode of accomplishing it be different. The law intended to defeat a certain end. It makes every bond or other evidence of debt given with intent to hinder, delay or defraud, creditors, void. If a part of the sum secured to be paid by the note itself (whether principal or interest) is illegal, the note must defraud creditors if enforced, and is, therefore, void, under the positive provisions of the statute. 10 *Cal.* 229.

SEC. 28. The consideration for making or indorsing a promissory note may be gone into at any time. 6 *Cal.* 138.

Notes Deposited as Collateral Security.

SEC. 29. If, when a creditor takes a bill before maturity as collateral security for an antecedent debt, there be any change in the legal rights of the parties in relation to such debt, the creditor becomes a holder for value, and the bill is not subject to the equities between the original parties. 14 *Cal.* 450.

In this state, taking such collateral security changes the legal rights of the parties, as it operates as a surrender by the creditor of the right to attach the property of the debtor, and this surrender is a sufficient consideration for the security. 14 *Cal.* 450.

SEC. 30. Where a negotiable promissory note, not yet due, is taken *bona fide*, as a collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the original parties. 8 *Cal.* 266.

If there be any new consideration for the assignment, then the assignee is a holder for value, and the maker is precluded from resorting to defenses that he might make

against the payee, were the suit brought by him. 8 *Cal.* 266.

A negotiable promissory note, not yet due, taken *bona fide* as collateral security for a pre-existing debt, is not a mortgage but a mere pledge of the note. 8 *Cal.* 267.

SEC. 31. Where defendant made and delivered to K. & Co. her note, to be used by them only as collateral security to raise money or get credit, and they so used it, and afterwards took it up from the pledgees: *Held*, that K. & Co. could not then sue on the note, as it had answered its purpose; and that plaintiff having taken the note after maturity and upon no new consideration, took it subject to the same defense. 17 *Cal.* 515.

SEC. 32. Defendant executed a note to the order of his brother, E. M. A., to be used by him for defendant's benefit in the purchase of goods, and E., the payee, deposited the note with plaintiffs as collateral security for his own debt, and afterwards paid this debt, or rather renovated it, and substituted other security, but failed to take possession of the note: *Held*, that plaintiffs had no right to the note or its proceeds, because it was by this process redeemed from the pledge to plaintiffs, and E. had then a right to its possession, and would hold it as agent for defendant; and that this would be true whether the guaranty—"Waiving demand and notice, I hereby guarantee the payment of the within note, value received. Boston, January 29th, 1857. Enoch M. Avery"—indorsed on the note, vested the legal title in plaintiffs or not, or whether the note were overdue or not at the date of such indorsement. 18 *Cal.* 309.

When Interest begins to Run.

SEC. 33. Where a promissory note is payable three months after date, with interest at four per cent. per month, but does not specify the time when the interest is to begin to run, the interest runs from the date of the note. 8 *Cal.* 149.

When the Receipt of Note is Payment of a Debt.

SEC. 34. The acceptance of a note payable at a future time for a pre-existing debt, does not extinguish the debt. Its only effect is to suspend the creditor's right to recover

until the maturity of the note, when he may surrender or cancel the note and proceed on the original consideration. 8 *Cal.* 506.

Taking a note, either of the debtor or a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment, and run the risk of its being paid, or unless the creditor parts with the note, or is guilty of some laches in not presenting it in due time. He is not obliged to sue on it; he may return it when dishonored, and resort to his original demand. It only postpones the time of payment of the old debt until default is made in the payment of the note. 8 *Cal.* 506.

SEC. 35. Where a note is executed for the amount of an account, without any agreement that the account is thereby satisfied or discharged, the only effect of the note is to extend the time of payment. Upon failure to pay at the maturity of the note a right of action accrues upon the account as well as on the note. 18 *Cal.* 330.

SEC. 36. A note given in consideration of an antecedent indebtedness does not, *per se*, discharge the debt. In the absence of an agreement to the contrary, the only effect is to suspend the remedy until the maturity of the note. 21 *Cal.* 11.

SEC. 37. The defendant, being indebted to the plaintiff, drew a bill of exchange in his favor upon a third person for a part of the amount. The bill was drawn on the fifteenth of October, 1861, and was payable on the twenty-third of the same month, but has not been presented for payment. The plaintiff sues upon the original indebtedness, and the defendant relies upon the bill as a discharge *pro tanto*. The receipt of a note or bill, on account of pre-existing indebtedness does not, *per se*, extinguish the debt. It operates, however, as a conditional payment; and if the payee of a bill so conduct himself as to release the drawer from liability upon it, he cannot maintain an action for the debt. 4 *Cal.* 388. Story in his work on bills (Sec. 112), after stating the obligation resting upon the holder in regard to presentment, etc., says: "A default in any of these respects will discharge the party in respect to whom there has been such default, and who otherwise would be bound

to pay the same, from all responsibility on account of the non-acceptance or non-payment of the bill, and will operate as a satisfaction of any debt or demand for which it was given." The authorities cited by the appellant are to the effect that receiving the bill does not of itself extinguish the debt; which, of course, is a very different question from the one presented here. The plaintiff offers no excuse for his failure to present the bill, and, so far as it goes, the defendant is entitled to the benefit of it in discharge of the debt. 21 *Cal.* 388, 389.

SEC. 38. Taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid; or, unless the creditor parts with the note or is guilty of laches in not presenting it for payment in due time, he is not obliged to sue upon it; he may return it when dishonored and resort to his original demand. It only postpones the time of payment of the old debt until a default be made in the payment of the note. Unless received by express agreement as payment, it does not extinguish the debt. It only operates to extend until its maturity the period for the payment of the debt. Its acceptance is considered as accompanied with the condition of its payment at maturity. 12 *Cal.* 321, 322. A bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. Where the note of a third person is given in payment of a precedent debt, it is always taken under this condition to be payment, if the money be paid thereon in a convenient time. In an action upon a covenant in a lease to pay rent, the defendant in defense to a part of the claim, gave in evidence a receipt of the plaintiff of one hundred dollars, purporting in terms to be in full for the rent for two quarters. The plaintiff was then permitted to prove that the note of one C., payable in four months, constituted a portion of the money named in the receipt; that C. failed before the maturity of the note, and took the benefit of the insolvent act, and that the note was not paid. The taking of the note was no extinguishment of the debt due for the rent, and there was no evidence that the plaintiff agreed to run the

risk of the solvency of C., and to take the note as absolute payment, except it be the inference arising from the receipt itself, and that is not enough to establish such a positive agreement. 12 *Cal.* 322, 323. There must be a clear and special agreement that the vendor shall take the paper absolutely as payment, or it will be no payment, if it afterward turn out to be of no value. Thus, where the plaintiff sued for goods sold and delivered, for which the note of a third person was taken, and a receipt in full given, it was left to the jury to determine whether the plaintiff had agreed to receive the note as payment, and to run the risk of its being paid. 12 *Cal.* 323.

SEC. 39. So, where the cashier of a bank on the maturity of a note accepted a check of a third person for part of the money and a new note for the balance, and thereupon delivered up the old note, it was held that on the dishonor of the check an action would lie upon the original note to recover the amount of the check, and that the delivering up of the original note was not evidence that the check and new note were received in payment. Nothing is to be considered as payment, in fact, but that which is in truth such, unless something else is expressly agreed to be received in its place. The mere promise to pay, whether by the original debtor or a third party, cannot of itself be regarded as an effective payment. 12 *Cal.* 323. Defendants were indebted to plaintiff in the sum of ten thousand dollars; subsequently parties had a settlement, and defendants gave to plaintiff, in part payment of the debt, a note of third parties for twenty-five hundred dollars, which was received by plaintiff without objection, and the same left with defendants for collection. The note was not paid at maturity, and plaintiff demanded the amount for which the note was taken in settlement of the defendants, who paid twelve hundred and fifty dollars and gave to plaintiff another note of the same parties for the balance, payable in one year; and it was held, that in an action by plaintiff against the defendants to recover the balance the defendants were liable for the amount. As the receiving of the note only operated to extend the time of payment of the debt to the time the note fell due, the statute of limitations would commence running only from that time. 12 *Cal.* 317.

Alteration in a Note.

SEC. 40. An alteration in a note which does not vary the meaning, the nature or subject-matter, of the contract, is immaterial. Where in the body of a note one party signs as principal and one as surety, both are liable; and therefore tearing off the word "surety" cannot be a material alteration in a suit against the maker and surety. 5 *Cal.* 175.

SEC. 41. A promissory note or a bill of exchange will be good when a blank is left for the sum, and that blank is filled up by the party to whom it is given. 8 *Cal.* 104. Where a bill is executed and delivered by the drawer, with a blank left for the sum or time when payable, these matters are not certain, but the power to make them certain is given to the holder. 8 *Cal.* 105.

SEC. 42. Where a promissory note was made bearing monthly interest, but leaving the rate of interest in blank, if the rate of interest is filled in by the holder he cannot, without some evidence of agreement, recover more than legal interest, though if he had passed the note thus filled up to an innocent purchaser the maker would be liable. The filling up of the blank is not such an alteration of the note as to vitiate it and prevent recovery; it supplied an omission by fixing an optional rate of interest, not binding on the maker without proof of the consent of the maker, but does not avoid the right to recover the principal and legal interest. 6 *Cal.* 579.

Payment of Note.

SEC. 43. Upon the payment of a note or bill, the maker or acceptor has a right to its possession, as a voucher of its payment. 4 *Cal.* 40.

SEC. 44. The surrender of a note is *prima facie* evidence of its payment. But where a note was delivered to the maker long before it became due, upon his giving the holder an order on the indorsers, which was dishonored, and thereupon it was returned to the holder, it did not operate as a payment. The indorsers were not injured by this transaction, nor were they subjected to any new risks. 5 *Cal.* 330.

SEC. 45. If a promissory note is surrendered up by mistake, under the supposition that it is fully paid, yet if not fully paid, the defendant is still liable for the balance due. 23 *Cal.* 223.

SEC. 46. A bill of sale made by the payee of a promissory note to the maker which bargains and sells, among other property, "all debts, notes and accounts, of whatever nature due me," is not evidence of the payment of the note. 26 *Cal.* 288.

SEC. 47. This is an action upon seven promissory notes of which the plaintiff claims to be the holder by assignment. Six of these notes, payable to different parties, were assigned to one of the makers, and by him to the plaintiff. The first assignment was before, and the second after, maturity, and the question arises as to the effect of these assignments. It is contended that the first assignment extinguished the notes, and that the subsequent transfer vested no right of action in the holder. The notes are payable to order, and, of course, are negotiable, but the complaint merely alleges that for a valuable consideration they were assigned, etc. Authorities are cited to show that a transfer of this character vests in the holder such rights only as he would acquire upon an assignment of a note not negotiable. The point is made with reference to certain matters relied upon as counter-claims, and is not important if it be held that the notes were extinguished by the first assignment. We are of opinion that the transaction amounted in effect to payment, and that the notes became *functus officio*, and were not revived by the assignment to the plaintiff. If the rights of the plaintiff had attached before maturity, and his position were that of an innocent holder, he would be entitled to protection, but under the circumstances the action cannot be maintained. It is clear that the notes could not have been enforced by his assignor, and having taken them with a knowledge of that fact, they are equally unavailable in his hands. What his rights are in respect to contribution it is unnecessary to decide; the action is based entirely upon the notes, and respecting them it cannot be sustained. It is possible that the plaintiff may recover upon the notes as against the assignor, but

however this may be, the present judgment is erroneous and must be reversed. 21 *Cal.* 79, 80.

When Note or Draft is Payable.

SEC. 48. When no day of payment is specified in a promissory note it is to be considered as payable on demand. 24 *Cal.* 329.

SEC. 49. The rule is well settled, that a note payable generally, not specifying any time of payment, with a provision that interest shall accrue after a certain event at a given rate, is due immediately, and the mere provision in respect to interest does not alter the principle. 17 *Cal.* 625.

SEC. 50. *Days of Grace.*—The following days, namely: the first day of January, the fourth day of July, the twenty-fifth day of December, commonly called Christmas day, shall for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, checks and promissory notes, made after the passage of this act, be treated and considered as is the first day of the week, usually called Sunday. Three days, commonly called "days of grace," shall be allowed, except on sight bills or drafts; and any one of the holidays specified in this act coming within the three days of grace, shall be counted as one of such days. All bills of exchange, checks, promissory notes or other negotiable instruments, which, by the terms thereof, are payable with or without grace, if the day for the payment thereof shall fall on any Sunday, or the fourth day of July, or on the twenty-fifth day of December, called "Christmas Day," or on the first day of January, or any other day commonly called "Thanksgiving Day," the same shall become due and payable on the day previous to any of the days aforesaid. *Gen. Laws*, 441, 442.

Of the Place of Payment.

SEC. 51. The non-attendance of the holder of a bill of exchange at the time and place of payment can produce no worse consequences to him than if he had attended, and the acceptor had also been present and tendered the money,

which the holder had refused to accept. Under such a state of facts, what is the legal consequence? When a debt or duty exists, such as the payment of a sum of money, a tender of the money, though it be refused, does not extinguish the debt or duty, but it remains obligatory on the party owing the debt or duty. 11 *Cal.* 318, 319.

SEC. 52. The meaning of the parties in designating the place of payment in promissory notes, or in the body or acceptance of bills of exchange, according to commercial usage, is not to insert a condition precedent, so that upon failure of the holder to attend at the designated place he shall forfeit his entire demand. No such intention exists, either with the maker or receiver of the note or bill. A note thus framed or a bill thus accepted, is like any other contract to pay at a designated place. The undertaking of the parties and the legal effect of such contracts is this: that if ready at the time and place with the funds, the obligor has so far satisfied the contract that he cannot be responsible for any future damages, either as costs of suit or interest for delay, and that he is thereby discharged of the debt. No one would receive an obligation depending upon such a contingency for its ultimate satisfaction. The insertion of the place of payment is usually made for the convenience of one of the parties, and is given and received with that understanding and none other. 11 *Cal.* 327.

When Check must be Presented.

SEC. 53. By the law merchant it is sufficient if a check drawn upon one day be presented for payment in usual banking hours upon the next succeeding day, where the payee resides in the immediate vicinity of the place of payment; for instance, in the same town or vicinity. In England, the payee of a check must, at the farthest, present the same for payment before the close of banking hours upon the next succeeding day to the one upon which the check is drawn and received. The payee of a check, in presenting it for payment, in order to hold the drawer, is bound to exercise reasonable diligence. That reasonable diligence in the presentation of a check drawn upon a banker, is sufficiently exercised by the presentation for pay-

ment upon the next day, during the usual banking hours. To constitute a commercial usage, it must be general in the mercantile community. 5 *Cal.* 229.

Demand on the Maker.

SEC. 54. The general rule as to the presentment and demand of commercial paper having days of grace, is this: the presentment and demand must be made within reasonable hours during the last day of grace. For the purpose of fixing the liability of indorsers, the note or bill is payable on demand at any time during those hours. What are reasonable hours will depend upon the question, whether or not the note or bill is payable at a place or bank, where, by the established usage of trade, business transactions are limited to certain hours. If there are such stated hours, where the note or bill is payable, the presentment and demand must be made *within those hours;* but if there are no stated hours and no place of payment is designated in the note or bill, the presentment and demand may be made either at the place of business or residence of the maker or acceptor; if at his place of business, it must be *within* the usual business hours of the city or town; if at his residence, then *within* those hours when the maker or acceptor may be presumed to be in a condition to attend to business. Payment, as a general rule, must be demanded within reasonable hours during the day of the maturity of the note. If there is a known custom or usage of trade in the town or city, that will furnish the proper rule to govern the holder, for then the presentment must be *within* the hours limited by such custom or usage. 8 *Cal.* 631, 632.

SEC. 55. Where an inland bill was accepted, payable at a banker's in London, and on its maturity was presented at the banker's, after the usual banking hours when the bank was closed, it was held that the presentation was too late. Where a bill is accepted in this manner, it must be understood by all parties concerned that it is to be presented for payment at the banker's within the usual hours of business; and not having been so presented in this case, there was no evidence of the dishonor of it in order to charge the drawer. 8 *Cal.* 632.

SEC. 56. A presentment of a bill by a notary at a house of business after it is closed, is too late. It must be made during times of business, at such reasonable hours as a man is bound to attend, by analogy to the *horæ juridicæ* of the courts. 8 *Cal.* 632.

SEC. 57. As to bankers, a presentment out of the hours of business is not sufficient; but in other cases, the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable; but a presentment between seven and eight in the evening is not a presentment at an unreasonable time. But a presentment made and payment demanded at eight o'clock in the morning of the last day of grace, were held to have been made at an unreasonable hour [it being the last day of grace]. A presentment and demand made a few minutes before twelve at night, after the maker had retired to rest, were also held to have been made at an unreasonable hour, and, therefore, insufficient and unavailing. 8 *Cal.* 633.

SEC. 58. The demand upon the maker should be made on the third day of grace and within a reasonable time before the expiration of the day, and if he then refuses payment, the holder has done all that is incumbent upon him to do, and may treat it as a dishonored bill, so far as immediately to give notice to the indorser; but still, the maker has the whole day to pay it, if he thinks proper to seek the holder. 8 *Cal.* 634, 635.

SEC. 59. If a note be made payable at sight, or at ten days after sight, or in ten days after notice, or on request or on demand, in all these and the like cases the note will be held valid as a promissory note, and payable at all events, although, in point of fact, the payee may die without ever having presented the note for sight, or without giving any notice to or made any request or demand upon the maker for payment. But the law, in all cases of this sort, deems the note to admit a present debt, to be due to the payee, and payable absolutely at all events, whenever or by whomsoever the note is presented for payment, according to its purport. Nay, where a note is payable on demand, no other demand need be made, except by bring-

ing a suit thereon. So, where a note does not specify any day or time of payment, it is by law deemed payable on demand, and, therefore, is construed as if it contained the words, "payable on demand," on its face. 12 *Cal.* 482.

SEC. 60. An indorser of a note payable on demand, no demand being made until thirteen months after the indorsement to plaintiff, is, *prima facie*, not liable. The delay is unreasonable. In such case, facts to excuse the delay are an essential part of the complaint, and, if not averred therein, it is insufficient. 14 *Cal.* 457.

SEC. 61. Where a note is payable in installments due at different times, and the demand on the maker is not made until the last installment falls due, and the demand is made for the whole amount due on the note, including the prior installments, the demand is good for the purpose of charging the indorser for the last installment. 24 *Cal.* 380.

Indorsee, His Contract.

SEC. 62. The contract of an indorser is simply a guaranty or declaration that he will pay if the maker does not pay upon presentment, if he receives due notice. Where one writes his name on the back of a promissory note, either in blank or accompanied by the use of general terms, his undertaking is attended with all the liability and all the rights of an indorser *stricti juris*. 2 *Cal.* 488.

SEC. 63. An indorser who signed his name under the words, "holder on the within note," is entitled to notice of demand and non-payment. 6 *Cal.* 439.

SEC. 64. Where payment by the maker to the indorser of a promissory note is relied upon as an excuse for want of demand and notice, it must be a payment directly and specifically for the note, and not as security for all transactions in the aggregate. If the maker did not specify that the payment to the indorser was to meet the particular note, it therefore results that the indorser had a right to apply the fund to any indebtedness he held against the maker; and further, to stand upon his strict legal rights as to demand and notice in regard to the note in suit. 5 *Cal.* 284.

SEC. 65. Where several successive indorsers advance

money on a draft payable to order, and it turns out that neither had title, by reason of the first indorsement being a forgery, each may recover from his immediate indorser. *Canal Bank* vs. *Bank of Albany*, 1 Hill, 287. The same rule applies to certificates of deposit. A subsequent indorser of a certificate of deposit undertakes that he possesses a clear title to the certificate, derivable from all the antecedent indorsers. *Mills et al.* vs. *Barney et al.*, 22 Cal. 240.

Indorsers, when Charged and when Not.

SEC. 66. As a general rule, the holders of bills are required to use the utmost diligence, and a failure on their part to make the presentment, and in case of non-payment to give proper notice to the drawer or indorser, will operate to release them from their liability on such bill. This notice may be dispensed with by express waiver or by any act which will amount to a waiver. The consequences of a neglect to present for payment may be waived by the same circumstances which excuse the presentment for acceptance, or notice of non-acceptance or non-payment. Among the circumstances which will excuse notice of non-payment is being informed by the drawer, before a bill is due, that it will not be paid at maturity. 7 *Cal.* 574, 575.

SEC. 67. Thus, where A draws a check in favor of B, dated the first and payable the fifteenth of the same month, on a bank wherein he is paying-teller, and the check is presented on the fifteenth by the agent of the holder, who is informed by A that it will not be paid, and at the same time payment is refused by A as teller of the bank, and no other presentment is made, A is liable thereon, although the same was not protested nor any notice of non-payment given. The fact that the defendant, who was both the drawer and, by reason of his situation as teller, payee of the bill, informed the plaintiff's agent before the maturity of the bill that it would not be paid, is sufficient to excuse presentment and notice. The failure to present at a proper time being in consequence of the act of defendant, he cannot take advantage of his own wrong to escape responsibility. 7 *Cal.* 575.

SEC. 68. A promise to pay a note made by an indorser

after its maturity, where no demand has been made or notice given, and made with full knowledge of the holder's laches, is binding upon the indorser, but this promise must be established by clear and distinct evidence. 24 *Cal.* 330.

SEC. 69. The substitution of a new security discharges the indorser. 5 *Cal.* 330.

SEC. 70. If the holder of a note take a fresh security and agree to give time, he thereby discharges the indorsers. If there be no express agreement for time, but a further security payable at a future time is received, that would, in general, imply an engagement to await until it becomes due; but by this is not meant that if one man guarantees another's note, past due, to be paid within a given time, this guaranty implies an agreement by the holder with the maker of the note to wait on the maker until the time limited in the guaranty. 10 *Cal.* 427.

SEC. 71. A recovery of judgment against the maker cannot affect the liability of the indorser; it is payment alone which can discharge him. If the judgment is not made upon execution the indorser may be sued, and if he is compelled to pay the amount, he has his recourse against the maker. The judgment between the holder and maker cannot be evidence between the holder and indorser, or, in a subsequent suit, between the indorser and maker. In a suit, therefore, against the maker of a note or the acceptor of a bill, the indorser is a competent witness for either party. 13 *Cal.* 87.

Notice to Indorser, When to be Given.

SEC. 72. The principle in relation to negotiable securities is, that after refusal to pay on demand, made on the day when the money is due according to the contract, the note or bill is dishonored, and notice may be immediately given to the drawer or indorser; though it is not necessary it should be given until the day after, or, if the indorser is in another town, by the next mail after the day on which the demand is made. The earliest possible notice of the fact which renders the indorser liable is the most advantageous to him, as the object of the notice is to enable him to secure himself. For the purpose of fixing the liability

of an indorser or other party entitled to notice, the holder of a note must see that a due presentment and demand of payment are made of the maker, and notice thereof given to the indorser; when this is done, the liability of the parties becomes fixed. The holder can then remain passive. If, however, the maker chooses after this to seek out the holder and pay his note, he can do so, and thus save himself from the liability to suit on the following day. The rule is, that for the purpose of fixing the liabilities of an indorser, the note is payable on demand at any time during reasonable hours on the last day of grace; but, for the purpose of sustaining an action, the holder must wait until the following day, as the maker has the whole day to make payment. 8 *Cal.* 634.

SEC. 73. Notice may be given to the indorser or other parties entitled to notice immediately after presentment of the note or bill is made to the maker and payment refused, although it is not necessary that such notice should be given until the following day. Where a note was presented for payment in the forenoon of the day it became due, notice of its dishonor given to the defendant in the afternoon of the same day was held not to have been premature. The note was dishonored as soon as the maker had refused payment on the day when it became due, and the notice must have answered all the purposes for which notice in such cases is required. The holder of a bill or note gives notice of its dishonor in a reasonable time, the day after it is due; but he may give such notice as soon as it has been dishonored the day it becomes due, and the other party cannot complain of the extraordinary diligence used to give him information. 8 *Cal.* 633.

SEC. 74. The contract of the acceptor is to pay on demand, and that is broken if the bill be not paid the instant it is presented; from which it results that notice may be given the same day. An action cannot be brought till the next day.

SEC. 75. If a note is payable in bank, notice of nonpayment may be given to the indorser on the evening of the day on which the note is payable, after the close of the banking hours, and such notice will not be premature,

because the note is commercially dishonored if not paid within those hours. As to a note not payable in bank, notice may be given on the evening of the day it is payable, at the close of the usual hours of commercial business; and in places where there are no regular hours of business, the notice may be given after sunset. 4 *Cal.* 30. Overruled 8 *Cal.* 681, which see. There is no doubt that notices may be given at the times mentioned, if presentment and demand have been made, but the inference from the language of the opinion is, that notices given at an earlier period of the day would be premature, and this the court intended to decide. The decision (4 *Cal.* 30) is in direct conflict with the law as to presentation and notice. 8 *Cal.* 631.

SEC. 76. A promissory note was made before the act of eighteen hundred and fifty-one (which makes the fourth of July a non-juridical day), which fell due on the first of July, and was payable on the fourth: *Held*, that notice of non-payment on the third was premature, and ineffectual to charge the indorser. 3 *Cal.* 146.

SEC. 77. Where a party signs a joint and several promissory note, he is not entitled to notice of demand and non-payment, though in fact he signed as surety, and such fact was known to the payee. 9 *Cal.* 557.

SEC. 78. Where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and non-payment is necessary. The draft is only an order of the company upon itself—from its head and secretary, upon its treasurer, an officer of the company. 10 *Cal.* 370.

Notice, How Served.

SEC. 79. In all cases where a notice of non-acceptance of a bill of exchange or non-payment of a bill of exchange, promissory note, or other negotiable instrument, may be given, by sending the same by mail, it shall be sufficient if such notice be directed to the city or town where the person sought to be charged by such notice resides at the time of drawing, making, or indorsing such bill of exchange, promissory note or other negotiable instrument, unless such person, at the time of affixing his signature to such bill, note or negotiable instrument, shall, in addition thereto,

specify thereon the post-office to which he may require the notice to be addressed. *Gen. Laws*, 439.

SEC. 80. Notice of demand and non-payment of a note should be personally served on an indorser residing in the same city where the note is held, and service through the postoffice is not effectual to charge him. 6 *Cal.* 439.

Form of Notice.

SEC. 81. No precise words or particular form is required in the notice to be given to the indorser of a promissory note or bill of exchange of its dishonor. It is sufficient if it appears, or can reasonably be inferred from the notice, that the note or bill has been duly presented for payment, and has been dishonored. A notice that a note has been duly presented, etc., and protested for non-payment, and that the holder looked to the indorser for payment of the same, is sufficient to put the indorser upon inquiry, which is all the law requires, and answers fully the reason and purpose of notice. The word "protested" has a definite legal signification. 4 *Cal.* 214.

SEC. 82. As to notice of dishonor to be given or sent to the indorser, no precise form or words is necessary to be used upon such occasions. Still, however, it is indispensable that it should either expressly, or by just and natural implication, contain, in substance, the following requisites: 1st. A true description of the note, so as to ascertain its identity. 2d. An assertion that it has been duly presented to the maker at its maturity and dishonored. 3d. That the holder or other person, giving the notice, looks to the person to whom the notice is given for reinbursement and indemnity. 14 *Cal.* 162.

SEC. 83. The object of the law in requiring a correct description of the note to be given in the notice to the indorser is, that he may be put upon notice of the extent of his liability, and placed in possession of the material facts necessary to enable him to secure the liability of others over to him, and his own reimbursement upon payment of the note. The rule was not intended to subserve a technical purpose, but to promote substantial justice, and when it sufficiently appears that the indorser, at the time of receiving the no-

tice, knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it, he cannot be permitted to object that his information was not communicated in a particular manner. And this, though the notice was verbal, and the note neither produced nor described. Where a note due January, eighteen hundred and fifty-seven, was indorsed by the payee to the present holder, November twenty-sixth, eighteen hundred and fifty-eight, and he, November twenty-ninth, eighteen hundred and fifty-eight, demanded payment of the maker, and verbally notified the indorser of such demand, and that he would be held on his indorsement, it is no objection to the notice that it did not state the time of demand. The demand was good, if made within a reasonable time, and before the notice; otherwise, as to notes indorsed before maturity. In such cases the notice must state the time of demand (14 *Cal.* 160), and the demand must be made on the day the note matures, or the indorser will not be liable; and to fix his liability, the notice must show that the demand was made at the proper time. 14 *Cal.* 162, 163.

SEC. 84. If a demand upon the makers of a note is made at maturity, but the notice to the indorsers states the demand to have been made on a day subsequent to maturity, such notice is insufficient to bind the indorsers. The object of notice to the indorser of a note or bill, is to advise him of his liability, so that he may take the earliest steps for his own security. Indorsers are a favored class of litigants, and the courts have always maintained their rights with great strictness. If, therefore, the very language of the notice conveys to the indorser, not the advice of his liability being fixed, but positive information which assures him necessarily of his release from liability, the object of notice would be defeated if it was insisted that he was still liable. The notice in such case, instead of arousing him to immediate effort for his security, lulls him into false security. Instead of being the protection which the law intended it to be, it would be a snare to entrap the unwary, and such a doctrine would soon lead to its total disuse. 5 *Cal.* 393–395.

SEC. 85. Notice left by a notary at the residence of an indorser of a note—he being absent at the time—describing

the note, stating that it was protested by him for non-payment, and that the holder looked to the indorser for payment, but not signed by any one, nor indicating in any way from whom it proceeded, is insufficient to charge the indorser. Such notice having been left on Saturday, the day the note matured, the record shows that on Monday, in a conversation between the indorser and the notary, "something was said about the note," and that the notary informed the indorser that plaintiff was "its owner and holder:" *Held*, that as a verbal notice, this conversation was insufficient; that a notice must inform the indorser, either expressly or by necessary implication, that the note has been duly presented at its maturity and discharged. 16 *Cal.* 376, 377.

Form of Notice of Demand and Non-payment of Promissory Note.

SEC. 86. The following is a form of notice of demand and non-payment of promissory note:

City and county of ....., ..., 18...

To ...., ..., ...

Sir: Please take notice, that a certain .... note dated ...., 18.., for the sum of .... dollars, payable .... months after date, drawn by .... in favor of ...., and indorsed by you on the .... day of ...., A.D. 18.., was this day presented by me to said ...., the maker of said note, and payment thereof demanded, which was refused, and the said .... note, having been dishonored, the same was this day protested by me for the non-payment thereof, and the holder looks to you for the payment thereof, together with all costs, charges, interest, expenses and damages, already accrued or that may hereafter accrue thereon by reason of the non-payment of said .... note.

Very respectfully, yours, etc.,

....,

Notary public.

Form of Notice of Protest for Non-payment.

SEC. 87. The following is a form of notice of protest for non-payment:

To ...., ...

Sir: Take notice, that your bill for .... dollars, at .... days from sight, dated ...., drawn and accepted by ...., has this day been protested for non-payment [or, "that the bill of ...., for .... dollars, at thirty days from sight, dated ...., indorsed by you"], and drawn on and accepted by ...., has, etc., as above. [Or, "that the note of ...., for .... dollars, dated the ...., payable at the

.... bank .... days after date and indorsed by .... and ...., has this day been," etc., as above.]

Dated ...., 18...

Your obedient servant,

....,

Notary public.

Form of Notice of Protest for Non-acceptance.

To ...., ...

Sir: Take notice, that your bill for .... dollars, at .... days from sight, dated ...., 18.., drawn on .... in favor of ...., has this day been protested for non-acceptance.

Dated ...., 18...

....,

Notary public.

Acceptor of Bill.

SEC. 88. The acceptor of a bill and the maker of a note stand in the same relation to the indorser in respect to primary liability. 13 *Cal.* 86.

SEC. 89. No person within this state shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration. An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration. Every holder of a bill, presenting the same for acceptance, may require that the acceptance be written on the bill; a refusal to comply with such request shall be deemed a refusal to accept, and the bill may be protested for non-acceptance. The foregoing shall not be construed to impair the right of any person to whom a promise to accept a bill may have been made, and who on the faith of such promise, shall have drawn or negotiated the bill, to recover damages of the party making such promise, on his refusal to accept such bill. Every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill or

refuse, within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or non-accepted, to the holder, shall be deemed to have accepted the same. *Gen. Laws*, 427–432.

SEC. 90. Such an order being a bill of exchange, the written acceptance of the party to whom it is addressed is necessary to charge him as acceptor under our statute. His verbal acceptance is not sufficient. 12 *Cal.* 97. Where the order is given for a valuable consideration, and for the whole amount of the demand against the drawee, though worthless as a bill, it operates as an assignment of the debt or fund against which it is drawn. The want of a written acceptance does not affect the right of the payee to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he must recover upon the original demand by force of the assignment. 12 *Cal.* 92.

SEC. 91. A person not previously a party to a bill of exchange, who, for a consideration, accepts the same, incurs thereby the liabilities of an acceptor equally as if he were the drawee. Where one, not the drawee, accepted a draft for the sole purpose of protecting the interest of his foreign correspondent, in a bill of lading accompanying the draft as collateral security, and took at the time an assignment of this bill of lading: *Held*, that although the collateral security turned out to be of little value, its receipt was a legal consideration for the acceptance. It is a sufficient consideration for the acceptance of a draft by one not a party to the paper, that the payee thereby loses the acceptance of the drawee. Inducements, not amounting to fraud, held out by the payee of a draft to procure its acceptance, do not invalidate the contract of the accepter. 22 *Cal.* 661. K. obtained an advance from a bank upon a bill of lading, for butter, purporting to have been shipped from Ireland to Liverpool, he giving to the bank the draft or bill of exchange for the amount of money advanced. The defendants, who were the drawees, accepted the bill, and received a transfer of the bill of lading from the bank. They soon ascertained that the bill of lading was a forgery, and then refusing to pay the draft a suit was brought on their accept-

ance. The court held that these facts constituted no defense to the action; that the bank were the indorsees and for value, and the failure or want of consideration between them and the acceptors constitute no defense; that the acceptance binds the defendants conclusively, as between them and every *bona fide* indorsee for value; and that it did not matter whether the bill was accepted before or after such indorsement. 22 *Cal.* 666.

SEC. 92. A debtor may accept orders in favor of different persons, for different portions of the debt, and those accepted orders will bind all parties. 7 *Cal.* 260.

SEC. 93. A letter of credit containing an unconditional promise to accept the bills drawn upon its faith, and the statute providing that such promise, in writing, made before the bill is drawn, is deemed an actual acceptance in favor of every person who upon its faith shall receive the bill *for a valuable consideration. Laws of* 1850, Chap. 100, Sec. 8; 14 *Cal.* 454.

SEC. 94. Where a draft is accepted conditionally, to be paid upon the happening of a contingency, whether the contingency has happened is a question for the jury. 8 *Cal.* 353.

SEC. 95. Notaries public shall have authority to demand acceptance and payment of foreign and domestic bills of exchange, and to protest the same for non-acceptance and non-payment, and to exercise such other powers and duties as by the laws of nations, and according to commercial usages, or by the law of any other state government or country, may be performed by notaries public. They may also demand acceptance of inland bills of exchange, and payment thereof, and of promissory notes, and may protest the same for non-payment or non-acceptance, as the case may require. *Gen. Laws*, 4694, 4695.

Protest of Notary.

SEC. 96. The original protest of a notary public, under his hand and official seal, of any bill of exchange or promissory note, for non-acceptance or non-payment, stating the presentment by him of such bill of exchange or note for acceptance or payment, and the non-acceptance or non-

payment thereof, and the service of notice on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice and the reputed place of residence of the party to such bill of exchange or promissory note, and specifying the mode of giving such notice and the reputed place of residence of the party to whom the same was given and the post-office nearest thereto, shall be *prima facie* evidence of the facts contained therein. The certificate of a notary public, drawn from his record, stating the protest and the facts therein contained, shall be evidence of the facts in the like manner as the original protest. *Gen. Laws*, 4702.

SEC. 97. By the fifth section of the act concerning notaries public, notes are made protestable; and by the tenth section the protest of a notary is expressly made evidence of demand and non-payment or non-acceptance of notes as well as bills. 5 *Cal.* 221.

SEC. 98. Section ten of the notary public act contemplates an insertion in the protest of the notary of the fact of service of notice, with specifications of mode, answer and place; and both the original protest and a certificate from the record of the notary shall be held equally admissible in evidence. The whole object of the record is to preserve, in a permanent form, the evidence of the protest and notice by which the liabilities of parties had become fixed. 8 *Cal.* 635.

SEC. 99. At common, law promissory notes were not protestable securities; they are made so by our act, and as a consequence the protest of them must be attended with all the incidents belonging to foreign bills of exchange. The recital of "notice given" in the protest is made evidence of the fact of notice; the notary is provided with a fee-bill for giving notice. In the face of these enactments it would be difficult to maintain that giving notice was not one of the official duties of the notary, for the neglect of which he would not be liable on his bond to the party injured. 6 *Cal.* 635, 636.

SEC. 100. In this state, the statute provides for the protest of foreign bills of exchange, inland bills and promissory notes. It requires the same record in all cases, and

gives to the certificate of protest of a promissory note the same effect as to the certificate of a protest of a foreign bill; and if in one case such certificate could, by necessary implication, import a demand of payment and refusal so it will in all cases. There is no necessity for protesting a promissory note; a demand of payment, and upon neglect or refusal notice to the indorser is all that is requisite. A formal protest is only necessary with foreign bills of exchange, but in practice, which is sanctioned by the statute, it is customary for notaries to formally protest notes upon demand of the maker and his refusal of payment; and the idea conveyed by the word "protest" is not merely that a formal instrument has been drawn up by a notary public, but that the paper in question has been dishonored upon due presentation and demand. Where a notarial certificate stated that "notice of protest" was duly given on the third day of grace, and it did not state that the presentment was made during office hours, it was held, that the certificate, in fair construction, imported a presentment during the proper hours of business. These, except when the paper is due from a bank, range through the whole day down to bedtime in the evening. It would be quite a forced presumption in the words of an officer, saying he presented on such a day, to fix the hour either before or after that when business is usually transacted. 8 *Cal.* 636, 637.

SEC. 101. The notarial certificate shows that the protest was made at the request of Drexel, Sather & Church, bankers, but does not state that they were at the time holders of the note or agents of the holder, and this omission is the ground of the objection of the appellant to the introduction of the certificate. It is no doubt true that the protest, when made by a notary, must be authorized by some one connected with the note, as holder or agent or as being liable for its payment. A mere stranger cannot confer the authority. His request would give no validity to the notary's act. The notary's general authority under the statute only extends to cases properly in his hands, and his protest in other cases is a mere nullity. But the objection of the appellant, however tenable, upon proof that the bank-

ers were strangers to the note, cannot arise from the omission of the certificate. The presumption that the authority of the notary was exercised in a proper case—in other words, upon the request of parties entitled to direct the protest to be made—attends the certificate, and a statement that the bankers were the holders of the paper or agents for its collection could not add to the force of this presumption. 13 *Cal.* 409.

Waiver of Presentment and Notice, How Proved, Effect of.

SEC. 102. An express waiver of notice of non-payment is equivalent to an admission that the note has been presented or need not be presented. 4 *Cal.* 63.

SEC. 103. Where an agent, on behalf of his principal, the indorser of a note, indorsed upon the note, on the day of its maturity, a waiver of *notice of non-payment: Held*, that it was competent to prove by the agent a verbal waiver of *demand* also; that where demand and notice are both waived in one agreement, but the waiver of the latter only is reduced to writing, the waiver of the former may be proved by parol. 19 *Cal.* 158.

SEC. 104. The defendant, being the holder of promissory notes secured by mortgages, indorsed the notes and assigned the mortgages before maturity, and for a full consideration to the plaintiff. The notes were not presented to the payee at maturity, and no notice of demand and non-payment was given to the defendant. The defendant, after the maturity of the notes, said to a third party: "that the fact of notice not having been given at a proper time would make no difference with him—that he would do what was right." Upon these facts it is not proper to conclude that "no presentment and notice of non-payment was necessary in order to bind the defendant; he, having taken security in advance, is liable as principal." The mortgages were taken to secure the ultimate payment of the notes, were assigned by defendant at the time of indorsing them, and were beyond his control. They were evidently not intended to indemnify defendant against his liability as indorser, and could have no such effect. The declaration of defendant to a third party not interested in the subject

matter: "that he would do what is right," was not a sufficient waiver of presentment and notice to fix the liability of the indorser. 5 *Cal.* 482.

Damages on Foreign Bills.

SEC. 105. The rate of damages to be allowed and paid upon the usual protest for non-payment of bills of exchange, drawn or negotiated within this state, shall be as follows: 1st. If such bill shall have been drawn upon any person or persons in any of the United States, east of the Rocky mountains, fifteen dollars upon the hundred upon the principal sum specified in such bill. 2d. If such bill shall have been drawn upon any person or persons in any port or place in Europe or in any foreign country, twenty dollars upon the hundred upon the principal sum specified in such bill. Such damages shall be in lieu of interest, charges of protest, and all other charges incurred previous to and at the time of giving notice of non-payment; but the holder of such bill shall be entitled to demand and recover lawful interest upon the aggregate amount of the principal sum specified in such bill, and of the damages thereon, from the time at which notice of protest for non-payment shall have been given, and payment of such principal sum shall have been demanded. If the contents of such bill be expressed in money of account of the United States, the amount due thereon and of the damages herein allowed for the non-payment thereof, shall be ascertained and determined without any reference to the rate of exchange existing between this state and the place on which such bill shall have been drawn, at the time of the demand of payment, or of notice of non-payment. If the contents of such bill be expressed in the money of account or currency of any foreign country, then the amount due, exclusive of the damages payable thereon, shall be ascertained and determined by the rate of exchange, or the value of such foreign currency at the time of the demand of payment. Where a bill of exchange shall be protested for non-acceptance, the same rate of damages shall be allowed on the protest for non-acceptance, as provided above, and shall be in lieu of interest, charges of protest and all other charges,

incurred previous to and at the time of giving notice of non-acceptance; but the holder shall be entitled to recover interest upon the aggregate amount of the principal sum specified in the bill and of the damages thereon, from the time at which notice of protest for non-acceptance shall have been given. The damages allowed by this act shall be recovered only by the holder of a bill, who shall have purchased the same or some interest therein, for a valuable consideration. *Gen. Laws*, 433–438.

Guarantors.

SEC. 106. One who puts his name on the back of a promissory note out of the course of regular negotiability, is not an indorser, according to strict commercial meaning. He is termed a guarantor, and this is so, whether his inscription is simply in blank or preceded by the words: "I guarantee the payment of the within." 2 *Cal.* 486. Such guarantee is not within the statute of frauds, for the want of a consideration expressed in writing. The contract—the promissory note—imports a consideration. Each one who writes his name upon it is a party to it, and from its commercial character, each party to it is an original undertaker. The liability of one may be with conditions, that of others without any; or, in other words, the liability may be primary and secondary. But each name constitutes a direct original promise founded upon the same consideration. 2 *Cal.* 487.

SEC. 107. If a promissory note is indorsed by a third person before delivery to the payee, the indorser, although *prima facie*, he would be presumed to be an accommodation indorser for the payee, and therefore, not liable to him, yet upon proof that such was not the intent with which he acted, but that his design was to be a surety or guarantor for the maker, becomes a guarantor of the note, and his liability to the payee is beyond question. 2 *Cal.* 606.

SEC. 108. The liability of a guarantor of a note must be fixed in the same manner as that of an indorser. 4 *Cal.* 277.

SEC. 109. Where the defendant in consideration of the extension, by plaintiffs, of a note held by them against A, executed a guaranty that the same should be paid within a

specified time, with increased interest, by the checks of the defendant and from the proceeds of sales of his own property, and providing that a failure of defendant to comply with his guaranty should operate as a determination of the extension granted to A: *Held*, that under the proviso, the plaintiffs must first exhaust their remedy against A on the original demand, and that then they could compel the guarantor to make good the deficiency. 7 *Cal.* 242.

SEC. 110. Where the holder of a note, after its maturity obtains from a stranger to the note a guaranty of its payment within a certain time, there is no presumption of law that such a guaranty is for the benefit of the maker, or that it extended to him the time of payment. It is like any other contract which is undertaken for a money consideration. The inference, if there is any, is, that like other transactions of business, the parties entering into it, do so because it is to their interest. If A has a paper which he desires to be made more secure by a new contract, he may, as is often done, give another a premium to guaranty it; or the other may be in some way interested in insuring it, or some moral, honorary, benevolent or friendly, motive may influence him; or being agent in taking the security and having full confidence in the goodness of the note, he is willing to satisfy the principal by guaranteeing it. But this motive, whatever it may be, is not guessed at by the law, which does not raise a presumption from such loose surmises, some of which may be more or less probable, but leaves the fact to be established by proof when necessary. 10 *Cal.* 427, 428.

SEC. 111. Where a promissory note was made payable to S., and previously to its delivery to the payee, was indorsed for the accommodation of the maker by H. and brother and defendant, upon an agreement of the indorsers with each other that each would become surety if the other would: *Held*, that the indorsers were guarantors, and were jointly and not severally liable in a suit by the payee, or a third person taking the note after maturity. There must be express words to create a several liability. The decision of this court (in 2 *Cal.* 485) only goes to the extent of holding that a notice of protest is as essential to charge a guar-

antor as an indorser. It does not change the previous rule in relation to guarantors in any other respect. The contract of both an indorser and a guarantor is conditional, but the conditions are unlike. The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security. 13 *Cal.* 31, 32. In regard to the question whether the guaranty "for value received, we guarantee the payment of the within note," is an unconditional obligation to pay the amount of the note, the authorities are conflicting in other states, and the ablest jurists are divided in opinion upon the question. Probably, in number, the preponderance is in favor of the rule of conditional liability, though it may well be questioned if the weight of argument be not on the other side. But early in the history of our jurisprudence, it has been held that notice is necessary in such cases, as in cases of indorsement (2 *Cal.* 486), and this after full discussion. Subsequently (5 *Cal.* 138), the same doctrine was reaffirmed. 13 *Cal.* 579, 580.

SEC. 112. The question in this case is the legal obligation imported by an instrument in this form: "Sixty days from date, for value received, we jointly promise to pay F. Reeves or bearer, the sum of four hundred dollars, etc., October 11, 1858, (signed) E. B. Howe, J. E. Mayo;" indorsed: "I guarantee the collection of the within note when due, (signed) A. Hayward." The defendant Hayward was sued together with the makers, and judgment had against him without further proof than the paper, and that the indorsement was made contemporaneously with the signing of the note. The question is, whether this engagement of Hayward is an original obligation to pay the money on the maturity of the note. Obviously, this indorsement of Hayward is not his promissory note, for a promissory note is a direct engagement by the payor to pay his own debt; whereas this is an engagement to pay the debt of another. The engagement is in aid of and collateral to the original liability of the principal or party for whom the guarantee is given. *Hall* vs. *Farmer*, 5 Denio, 487; *Munson* vs. *Durham*, 3 Hill, 591; *Story on Prom. Notes*, Sec. 457. It is not necessary to inquire whether this guarantee is void because it does not express the consideration. See, however, 6 *Cal.*

102; 7 *Id.* 32. It is enough for the purposes of this decision to hold that appellant was a guarantor and not a promisor, and therefore that he was entitled to notice before he could be charged on his contract. *Rigg* vs. *Waldo*, 2 Cal. 486; *Pierce* vs. *Kennedy*, 5 Cal. 138; *Geiger* vs. *Clark*, April Term, 1859; *Lightstone* vs. *Louis et al.*, 4 Cal. 277. The demurrer should have been sustained. 16 *Cal.* 153.

SEC. 113. The following opinion, delivered August 4th, 1870, is a review of the decisions on the subject in hand, and confirms the doctrine that a guarantor as well as indorser is entitled to demand and notice: The defendant Wilcox signed his name in blank upon the back of a note and before the delivery of the same. After the note became due, but too late to charge Wilcox as indorser, demand was made for payment, and upon its refusal, notice was given to Wilcox. It is claimed that the failure to make demand and give notice in time discharged defendant Wilcox. A great diversity of opinion exists as to the nature of the liability of one not being a party who indorses his name in blank upon a note before delivery. In England, he is held to be a guarantor, and his contract is that the maker of the note will pay it at maturity, or, if he does not, the guarantor will. No demand or notice is considered necessary as a condition precedent to fixing the liability of the guarantor or to the commencement of the action; but a failure to make demand and give notice, together with proof of injury, is, *pro tanto*, a defense. In some states, as in Massachusetts, Vermont and Louisiana, he is regarded as a surety or joint maker of the note, and unconditionally liable. In some states he is held to be a guarantor, and various effects have been given in these states to the contract of guarantee, sometimes being held to be conditional, at other times absolute; and very frequently parol evidence is admitted to explain what the contract really was. In other states, as in New York, Tennessee, Iowa, and we may add, California, he is held as indorser. So far back as 1852, the supreme court of this state, in *Riggs* vs. *Waldo* (2 Cal. 487), held that the liability of a guarantor under such circumstances was that of an indorser; and this case has been affirmed by numerous subsequent decisions. The

respondent, however, claims that in these cases no demand and notice whatever had been made or given, and therefore it was only necessary to hold in these cases that demand and notice are necessary to fix the liability of a guarantor. We think, however, this is not a proper construction of the decisions. In *Riggs* vs. *Waldo*, the question was as to the nature of the liability of one who, not being a party to a note, indorses his name in blank before delivery; and it was held, that "his undertaking is attended with all the liability and all the rights of an indorser *stricti juris*." It was held that demand and notice were necessary, because his liability was that of an indorser; otherwise no demand and notice would be necessary to fix the liability, nor could they become material except upon the question of diligence where loss has been sustained. The decisions in this state are substantially in accord with those which hold that one who, not being a party to a negotiable bill, indorses it in blank for the purpose of adding to its credit, is an indorser, and in view of the diversity of opinion on the subject we should not now feel inclined to disturb the doctrine, even if it did not meet our approval. But we think the doctrine of *Riggs* vs. *Waldo*, by far the most reasonable and just. There seems no difference between the undertaking of a general guarantor and that of an indorser, except that the former, being a party to the note, his contract is construed by the law merchant, while the undertaking of the latter is construed by the general law of contracts. Each undertakes that the maker will pay the note at maturity, and in case of being compelled to pay it for the principal, each has recourse upon his principal to recover the amount paid, and there is no good reason why they should not have equal opportunities to secure themselves from the assets of the maker. The law merchant has established what is due diligence and what is a reasonable time within which demand and notice should be made to bind an indorser, and upon principle the same diligence should be used to charge one who has assumed the same responsibility as a guarantor.

Sureties.

SEC. 114. A surety of a note is a secondary promisor,

and it is not material on what part of the note he places his name; if the character of his liability is made to appear, his rights are the same as those of an indorser. 6 *Cal.* 396. It is not so much the position of the party's name upon the paper which denotes his liability (although it frequently does so), but it is the intention with which he executes it, if such intention is made to appear by the note itself, which determines whether his liability is primary or secondary. Where A authorizes B to sign his name as surety to a note, and B signs A's name with his own, as joint and several makers of the note, A is not liable—the authority not being exercised in the manner delegated. 6 *Cal.* 397.

SEC. 115. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time and had given no notice of demand and protest. 9 *Cal.* 21. Mere neglect to sue is no defense. 5 *Cal.* 173; 9 *Cal.* 21.

SEC. 116. A joint maker of a promissory note, signing it as surety, is entitled to demand and notice before he can be held to pay it. The obligation of the surety in such cases is that of an original promisor. 10 *Cal.* 288; overruling 6 *Cal.* 394. A party signing a joint note with another, for the latter's accommodation, is not a mere guarantor or indorser. The two classes of obligation are widely variant. The maker upon the face of the paper, with whatever motive or purpose he may sign it, is bound by the contract which he signs, according to the legal effect and meaning of the words. He cannot vary that meaning by parol. The words import an unconditional promise to pay the payee so much money at a certain time. The law affixes to this unequivocal language its obvious signification. The payor is not permitted to contradict the words by showing that when he promised to pay absolutely he meant to bind himself to pay conditionally or on some contingency, or if another did not or if demand was made and notice given. This contract being his own and precise in its terms, he must fulfill it according to those terms. He is not—and this is the distinction in the two classes of engagements—guaranteeing

another's contract, but he is making his own; and whether the consideration of the contract inure to him or his friend is wholly immaterial, so far as the construction and obligation of it are concerned. An indorsement or a guaranty of a note is wholly different. It is an agreement of itself—a new contract undertaken for another, that the latter will perform his contract. The difference between a maker and an indorser or guarantor is, that the contract of the first, by its terms, imports an unconditional obligation to pay money—that of the last, by its terms, imports a conditional obligation. The rules of law settle this species of contract as well as others, and prescribe how they may be created—their legal effect and mode of enforcement. The creditor may take his security in either form; the other parties may contract or not, as they choose, but the contracts when made must stand or fall by the legal rules prescribed for them, respectively. There is no magic in the words "surety" or "guarantor," which gives to a contract made by this class of contractors any effect denied to the contracts of other persons. A surety for another may bind himself to a creditor for his principal, if he uses apt words of obligation, just as an agent may be bound for his principal or a principal for himself—the obligation arising from the language of contract, not the man who makes it. There is no reason, if the parties so agree, why the guarantor or indorser may not bind himself, absolutely and primarily, to pay the debt of another; nor why a man may not as well bind himself primarily to pay a note for another as surety for the other, as well as secondarily. He may pledge his goods or credits or note, for him, and bind himself, without respect to any act to be done by the principal or the creditor. Precisely such is the nature of an obligation made in absolute terms, on a consideration, by A to pay so many dollars to B by a certain day, though the note should say in the body of it that A promised to pay for C or as surety for C. If such a note could be enforced as an original promise, if made by A alone, it is no less an original promise when made by A and C, jointly and severally, though the joint note showed that A made it as surety for C. It is immaterial to the payee how or why A signs it;

that is a matter between the two payors; he is satisfied with holding them both as principals to him, and in doing this he is only enforcing the language of their own voluntary contract, according to its own plain words. 10 *Cal.* 289, 290. A guarantor may, usually, be a surety, but a surety is not necessarily a guarantor. 10 *Cal.* 290. The court in a former case (6 *Cal.*, about 394) say: "It is not so much the position of a party's name upon the paper which denotes his liability (although it frequently does so), but it is the intention with which he executes it, if such intention is made to appear by the note itself, which determines whether his liability is primary or secondary." This may be; but the position of the names beneath the words which import a direct, primary obligation to pay the money to the payee, is conclusive evidence of that intention; the bare name on the back of the paper might not be. The word "surety," written opposite the name of one of the makers, is held to indicate no more than that, as between the payors, such maker is his surety. It is convenient for the purpose of evidence, in case the surety has to pay the money, but it does not in any way control the words of the note as between such payor and the payee; for there is no necessary inconsistency between an absolute engagement to pay money and paying it on behalf or as security for another man. It is useless to inquire into the intent of the payor in such a case; the intent must be presumed to be according to the law. 10 *Cal.* 290, 291.

When Surety Released.

SEC. 117. Where a promissory note is executed jointly by two persons, and one of them is surety for the other, and at a time when the principal in the note is solvent the surety makes demand on the creditor to proceed at once and collect the debt from the principal, and the creditor fails to sue the principal, who afterwards becomes insolvent, the surety is not thereby released from his liability on the note. 24 *Cal.* 158.

Actions of Sureties against Maker.

SEC. 118. Where A executes a promissory note to B,

bearing interest at three per cent. per month, and C, D and E, sign the note as sureties for A, and B afterwards recovers judgment on the note against A, the maker, and the sureties, and the sureties pay the judgment, in an action by the sureties against the maker for the money thus paid, they can only recover judgment for the amount of money paid, with interest at the rate of ten per cent. per annum from the time of payment. Where there is no agreement or contract in writing fixing a different rate of interest, parties are limited in their recovery to ten per cent. per annum. The rate of interest fixed in a promissory note is not a contract or agreement in writing between the maker of and sureties on the note. 23 *Cal.* 63.

When and by whom Suit can be brought on Note.

SEC. 119. A note payable one day after date, without grace, cannot be sued on the day after its execution. 18 *Cal.* 378.

SEC. 120. One partner may waive grace upon a firm note made by him; and where such note is made payable on demand, without grace, an action upon it commenced the next day after its execution is not prematurely brought. 21 *Cal.* 636.

SEC. 121. The payee has all of the day on which the note falls due in which to pay it, and, therefore, a suit commenced on that day is premature. 3 *Cal.* 262.

SEC. 122. The holder of a negotiable note is *prima facie* the owner thereof for a valuable consideration. 8 *Cal.* 49.

SEC. 123. The party to whom a note is made payable is *prima facie* the owner. His right to maintain the action cannot be questioned on the ground that it belongs to a third party, except the defendant pleads payment to or offset against that party. 5 *Cal.* 485.

SEC. 124. It is no objection to recovery on a bill that, by special indorsements on it, title is shown out of the payee, without any retransfer from the last indorsee to him, if there be proof that the indorsements were made simply for collecting the bill, and that the indorsees had no interest in it. 14 *Cal.* 450.

SEC. 125. Because a mortgage, given to secure the pay-

ment of several notes falling due at different times, provides for payment at times or in modes different from the notes, is no objection to suit on the notes at maturity. 14 *Cal.* 94. The notes and the mortgage are not, for all purposes, one transaction or one contract. For many purposes they are different contracts. The payee may sue on his note without proceeding to enforce his mortgage. He may never enforce it or have occasion to enforce it. The contract of indebtedness is one thing, the contract by which that indebtedness is secured is another thing. The terms of these contracts may be widely different. The note may be absolutely due by a given day, the security may provide for its payment by a far distant day, and this security may be qualified or conditional, partial or complete, contingent or absolute. In other words, the contract by which security is afforded may be wholly different; indeed, often is wholly different from the terms of the contract of indebtedness; if in the form of a mortgage, the mortgage is never legally enforceable on the day the debt is due, but the note carries with it the obligation of prompt payment on that day. 14 *Cal.* 99, 100.

SEC. 126. Where, in a mortgage to secure the purchase money of land for which notes were given falling due at different times, the condition was: "*Provided*, that previous to the dates of said payments it shall have been decided by competent authority that the title to said land is fully vested in the party of the second part, and the party of the first part is given full and peaceable possession," the holder of one of the notes transferred before maturity may sue on it at maturity, although the title to the land has not been settled and peaceable possession not given. The fact that the purchaser of the note saw the mortgage and note was no notice to him of any valid defense to the note. 14 *Cal.* 94.

SEC. 127. Where F. sues the maker of a note which has two indorsements signed by the payee—the first, a receipt from F. for the amount due; the second, in the words, "without recourse to me"—there is no presumption that the indorsements were made at different times or that the payment was a voluntary, unconditional payment. In such a case the court may instruct the jury, as a matter of law,

to find for the plaintiff, in the absence of evidence showing a legal or moral obligation on the part of plaintiff to pay the debt of defendant. 8 *Cal.* 47.

Past Notes or Checks or Negotiable Paper.

SEC. 128. In the case of the loss or destruction of negotiable paper, the plaintiff cannot maintain an action without first indemnifying the defendant. 5 *Cal.* 484.

SEC. 129. Where it is alleged that a negotiable security, as, for example, a banker's certificate of deposit, has been lost or destroyed, the maker of it has a right to require indemnity against all future claims under it before its payment can be enforced by law. It may in some cases operate as a great inconvenience, and may even produce hardship, but so does nearly every mischance or misfortune. 4 *Cal.* 41.

SEC. 130. Where a check had been lost and paid by a banker upon a forged indorsement: *Held*, that upon a suit for the same, after a refusal by the banker to deliver the check to the owner, in the absence of rebutting evidence the measure of damages must be the full value of the amount for which it was drawn. 5 *Cal.* 124.

SEC. 131. If a promissory note is assigned by the payee before maturity, payment to the assignor is no defense to an action brought by the assignee against the maker, unless it was made before the assignment and the assignee took the assignment with notice of the payment. 26 *Cal.* 288.

SEC. 132. Commercial paper transferred before maturity as collateral security for a pre-existing debt is not subject to the defenses of payor against payee. 8 *Cal.* 260 affirmed. 14 *Cal.* 94.

SEC. 133. A draft or order by A on B to pay C or order the balance due A by B, is not a negotiable security, not being for any fixed sum, but if indorsed by B, "balance due, one thousand dollars," over his signature, it becomes a promise by B to pay C or his order that sum, and is negotiable. Where, in such a case, B was garnisheed in a suit against C, the day before he made the indorsement, but failed to inform C thereof, and C for a valuable consideration sold the order, as indorsed, to D, an innocent pur-

chaser, it was held, that B, having made the order negotiable and put the same in circulation, is estopped from setting up against it any antecedent matter, and is liable to D for the full amount thereof. And where the order was on a firm, and such an indorsement was made by one of the firm, it operated as a release of the firm by the holder and as an acceptance by the partner indorsing. 8 *Cal.* 101.

SEC. 134. A party taking a check after its presentation for payment to the bankers upon whom it is drawn and its dishonor, takes it subject to all the defenses to which it was subject in the hands of the original holder. 10 *Cal.* 523.

SEC. 135. A executed a note and mortgage to B. Subsequently A and B entered into partnership in the livery business. A was to furnish the stable, hay and grain, and board B, and B was to attend the stable, the profits to be equally divided, and the share of A was to be applied in discharge of the note. B received the sum of three hundred and ninety-six dollars, A's share of the profits of the business, and then, after maturity, assigned the note and mortgage to C. C brought suit against A for the whole amount. A plead payment and set-off: *Held*, that A was entitled to the credit of the payment. 9 *Cal.* 294.

SEC. 136. This is an action to recover of the maker and indorser the amount of a certificate of deposit for eighteen hundred dollars. The certificate was indorsed by the payee, who sold and transferred the same to one Logan for the consideration of four hundred dollars. Immediately after this sale payment was demanded of the maker, and a notice of protest served upon the indorser. Subsequently to this, Logan transferred the certificate to the plaintiff. The question is, whether under these circumstances, the indorser is liable for the full amount of the certificate. 1 *Cal.* 159. The plaintiff holds the certificate subject to all the equities existing between the indorser and Logan. He took it after maturity, and after it had been protested for non-payment, and must be deemed to have taken it with full knowledge of these equities. Any defense which the indorser could avail himself of as against Logan, he is entitled to as against the plaintiff. As between him and Logan, the certificate can

only be regarded as having been negotiated in the course of trade to the amount paid as a consideration for the transfer, and his liability as an indorser is limited to that amount. Of course, the plaintiff is entitled to recover of the maker the full amount of the certificate. There is no principle of law better settled than that a person who purchases negotiable paper after it has been dishonored or overdue, takes it subject to all the equities which properly attach thereto between the antecedent parties. See *Story on Promissory Notes*, Sec. 190, and authorities there cited. It is also settled by a uniform current of authorities, that where the consideration passing between the indorsee and his indorser is not equal to the amount of paper, the indorsee in an action against the indorser can only recover the consideration which he has actually paid. *Cook* vs. *Cockrill*, 1 Stew. 475; *Brown* vs. *Mott*, 7 Johns. 360; *Braman* vs. *Hess*, 13 Johns. 52; *Munn* vs. *The President, etc., of the Commission Company*, 15 Johns. 43; *Youse* vs. *McCreary*, 2 Blackf. 243. Many other cases are cited in the brief of appellant's counsel, and we have been unable to find a single authority which establishes a different doctrine. It follows that the judgment of the court below must be reversed, and the cause remanded for a new trial. A certificate of deposit for one thousand eight hundred dollars, payable to the order of V. was indorsed, sold and delivered by V. to L. for four hundred dollars. Payment was then at once demanded of the maker, and notice of protest served on V. Subsequently, L. transferred the certificate to plaintiff: *Held*, that plaintiff can recover of V. only the four hundred dollars received by him, the certificate being subject in the hands of plaintiff to all the equities between the indorser and indorsee. Where the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee, in an action against the indorser, can recover only the consideration he has actually paid. *Coyne* vs. *Palmer*, 16 Cal. 160.

SEC. 137. Whoever claims unnegotiable paper must do so in the name of the payee, and consequently, the defense of payment to the payee would be valid against all others. 4 *Cal.* 39, 40.

SEC. 138. This is an action upon a note and mortgage for three thousand dollars, executed by the defendants to Lewis Sloss & Co., and assigned to the plaintiff after maturity. The defendant McDonald avers in his answer, that the consideration for this note and mortgage was received by the other defendants, and that he executed the same for their benefit and accommodation. He further avers that the assignment to the plaintiff was a fraud upon his rights, and that the consideration for the assignment was paid, either in whole or in part, with money advanced by the other defendants for that purpose. He also avers that he deposited with Sloss & Co., as additional security, certain notes or "scrip," issued by the Camp Far West Water and Mining Company, and that, prior to the assignment to the plaintiff, Sloss & Co. converted these notes to their use, and refuse to account for them in any manner whatever. The question is as to the validity of these defenses. If the averment relative to the consideration for the assignment be true, the amount advanced by the co-defendants of McDonald should be entered as a credit upon the note and mortgage, and the recovery limited to the amount actually paid by the plaintiff. If the defendants paid the whole, such payment satisfied and discharged the debt, and the plaintiff cannot recover. The equities of the parties might be different if, as between the defendants, McDonald were liable for any portion of the indebtedness. So far as the notes held by Sloss & Co. as additional security are concerned, there is no doubt that the rights of McDonald are the same that they would be in an action prosecuted by Sloss & Co.; nor is there any doubt that in such an action Sloss & Co. could be compelled to account for the value of these notes. The plaintiff is chargeable with notice of all the equities existing between the original parties, and he took the assignment subject to these equities. It would be an act of gross injustice to compel McDonald to pay this debt, and turn him over to his action against Sloss & Co. to recover the value of the securities. He is entitled to this value as a credit upon the debt for which the securities were pledged; and even if it should turn out upon the trial that the notes had not been converted as charged in the

answer, it would still be unjust to compel payment without at the same time requiring their surrender. 17 *Cal.* 290, 291.

SEC. 139. The plaintiff in execution, after having assigned a judgment, pretended falsely and fraudulently to be the owner of it, and so pretending made a contract to discharge the judgment by taking a note not negotiable, in the mercantile sense, in payment; the makers of the note agreed to this arrangement under the notion induced by him that he was the owner; they afterwards discovered he was not. When they did so ascertain, they refused to pay the note: *Held*, that the makers of the note, on discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note, even to assignees before maturity thereof. 14 *Cal.* 661, 666.

Defenses by Maker against Assignee.

SEC. 140. County warrants acquire no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred, or in what faith they may have been taken. If illegal when issued they are illegal for all time. The protection which attends the purchaser of negotiable paper before maturity, without notice of the illegality of its consideration, does not extend to like purchasers of county warrants. Were this otherwise, it is easy to see that the county would be entirely at the mercy of the board. A transfer of the warrant, no matter how illegal the claim for which it was issued, would leave the county remediless. 11 *Cal.* 175.

Execution of Note, How Proved.

SEC. 141. The execution of a promissory note, signed with an x or mark, may be proved by evidence of admissions of the alleged signer, in the absence of any attesting witness. 22 *Cal.* 482. In an action upon a promissory note, executed by Thompson & White, and purporting to be executed by the appellant by his mark, the defendant Alford denied under oath the execution of the note by him, and that was the only issue. The case was tried by the

court, a jury being waived, who found for the plaintiff, and the defendant, Alford, appeals from the judgment rendered thereon, and from an order refusing a new trial. The only error assigned is that the finding of the court is against the law and evidence; that the evidence is insufficient, considering its character and all the circumstances, to prove the execution of the note by the defendant. We have carefully examined the evidence and are satisfied that it is sufficient to prove the fact in issue. It is true there was no attesting witness to the signature, but that is not indispensable. The execution may be proved by competent testimony in the absence of an attesting witness. *George* vs. *Surrey*, 1 Moody & Malkin, 516. And even when there is a subscribing witness to a promissory note, it has been held that the admissions of the party of the execution of the note is as high proof as that derived from a subscribing witness. *Hall* vs. *Phelps*, 2 Johns. 451; *Mauri* vs. *Hefferman*, 13 Johns. 75. So it is held that the declarations of the maker of a note may be resorted to to prove the execution of the instrument, whenever proof of his handwriting can be resorted to. 2 *Phillips' Evidence*, C., H. & E.'s Notes, 501, Note 441. The proof in this case consists entirely of the admissions of the defendant made to the plaintiff and two other witnesses, and we deem them sufficient to sustain the findings of the court. 22 *Cal.* 483, 484.

Notes and Bills Executed by Agents.

SEC. 142. A party who gives his power of attorney to another authorizing the latter in general terms "to manage and transact all business matters of every nature and description in which I may be interested," and "to make, execute and deliver, promissory notes, bills or bonds," will be held liable for all such securities executed in his name by his attorney where they have reached the hands of an innocent holder, although they may have been made for the private individual purposes of his attorney. Where one of two innocent persons must suffer, it must fall on him who has trusted most. 6 *Cal.* 15.

SEC. 143. A person may draw, accept or indorse, a bill by his agent, and it will be as obligatory upon him as

though it was done by his own hand; but the agent in such case must either *sign the name* of the principal to the bill, or it must appear on the *face of the bill itself* in some way or other that it was in fact done for him, or the principal will not be bound; the particular form of the execution is not material, if it is substantially done in the name of the principal. 7 *Cal.* 540. If it can upon the whole instrument be collected that the true object and intent was to *bind the principal and not merely the agent*, courts will adopt that construction of it, however informally it may be expressed. 7 *Cal.* 540. Where the agent discloses the name of the principal, or that fact is otherwise known to the party receiving the bill at the time the same is made, then the agent is not responsible, though the name of the principal be not stated on the face of the paper, and only the name of the agent be signed, with the term "agent" appended to it. Where a bill of exchange was headed with the name of a banking-office, and when paid was to be charged to that office, and was signed by a person as *agent: Held*, that the agent was not personally responsible thereon unless it could be shown that he was guilty of deceit in drawing the bill without authority. 7 *Cal.* 542.

SEC. 144. A note stating that: "We, the undersigned trustees of the First African Methodist Episcopal Church, in behalf of the whole board of trustees of said association, promise to pay," etc., and signed, without qualification, by two persons having authority, is the note of the church and not of the signers. 13 *Cal.* 45. The general rule which governs in such cases is, that although a party acts, in making an obligation of this kind, as an agent, yet he does not protect himself from liability, unless the instrument shows that in executing it he *is* such agent, and meant only to contract for his principal. 13 *Cal.* 47.

SEC. 145. It is not sufficient to charge the principal or protect the agent from personal responsibility merely to describe himself as agent, if the language of the instrument imports a personal contract on his part. But where the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of

the principal, if he acted by competent authority, the principal and not the agent will be bound. If A says: "On behalf of B, and for value received by him, I, A, as agent for B, promise to pay C one hundred dollars," it would seem that this is the note of B. It is true, A makes the note, but he makes it on behalf of B, which, especially in connection with the statement of the consideration passing or having passed to B, would imply very clearly that the note was signed by A as agent of B, the obligation to pay being his. 13 *Cal.* 48, 49.

SEC. 146. An agent signing his own name to a promissory note made on behalf of his principal is not personally liable as a maker if the instrument itself discloses the intention to bind his principal and not himself. The supreme court say: "This is an action upon a promissory note in the following form: 'Three months after date the Ocean Mining Company promise to pay W. G. Bright or order one thousand dollars, for value received, with interest at the rate of two per cent. per month.' The note is signed: 'James Harter, trustee, S. N. Stranahan,' both of whom are made defendants and charged as makers jointly with the company, which is alleged to be a corporation. No answer being filed judgment was entered against all the defendants, and from this judgment Harter and Stranahan appeal. The complaint alleges that the note was executed by Harter and Stranahan as well as by the company, but the note itself, a copy of which is set out in the complaint, shows it was not their intention to bind themselves personally. The promise stated in the note is that of the company, and by failing to answer, the note is admitted as a company obligation, and this being the character of the instrument as appearing upon its face, we regard it as binding upon the company alone. It is evident that Harter and Stranahan signed it merely as agents, and as a judgment has been recovered upon it against the company, their authority to execute it cannot be questioned; its language shows that they executed it for the company and not for themselves. The law governing the case is distinctly laid down in *Haskell* vs. *Cornish* (13 Cal. 45)." 21 *Cal.* 45–47.

Notes Executed by Corporations.

SEC. 147. A corporation may bind itself by a note and mortgage, made by its president and secretary, and signed by them in their official capacity as such. 10 *Cal.* 441.

SEC. 148. Where the answer in a suit against a corporation on its own note relies simply on the want of power of the corporation to issue notes, the defendant cannot afterward object that the plaintiff has not shown that the officers executing the note were empowered by the corporation to do so. 6 *Cal.* 7.

Executed by Infants.

SEC. 149. An infant may make or indorse a promissory note or bill of exchange, and as to him the note in the one case and the indorsement in the other will not be void but voidable at his election. An infant may execute a promissory note by agent. Of two copartners in trade, one was an infant and the other of full age; the adult, for a debt of the copartners, made a promissory note in the name of the firm, and the infant, after coming of full age, ratified it, and it was holden good against him. An infant promisee may, by parol, authorize another to transfer a note by indorsement for him, and the transfer so made will be held valid until avoided. An indorsee, deriving title from an infant indorser, acquires a good and valid title to the note against every other party thereto except the infant, since the title is not void but voidable only. The infant may, indeed, at any time before ratifying the transfer, intercept payment to the indorsee, or, by giving notice to the maker of his avoidance, furnish to him a valid defense against the claim of the indorsee; but until he does so avoid it, the indorsement is to be deemed, in respect to such antecedent parties, a good and valid transfer. 24 *Cal.* 208, 209.

Executed by Partners.

SEC. 150. Where one partner having the power to sign the partnership name to a note, uses his power for his own purposes and in fraud of his partners, the parties are liable to an innocent holder. 6 *Cal.* 16.

SEC. 151. A promissory note made in the firm name of a

partnership, but for the private uses of the partner making it, is binding on the firm, in the hands of an innocent holder, though not in the hands of one having knowledge of the fraud. 6 *Cal.* 141.

SEC. 152. It is no defense to a note, given by one partner to the other, for his interest in land held jointly by both, that the payee of the note had deceived his partner, the maker, in the division of partnership stock, and was indebted therefor in an amount equal to or greater than the sum due on the note. As such division has nothing to do with the consideration of the note, it cannot be set up as a counter-claim or defense to the action on the note. 6 *Cal.* 276.

Executed Trustees, Guardians.

SEC. 153. As to trustees, guardians, executors and administrators and other persons, acting *en autre droit*, they are, by law, generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit or for whose estate, they act, and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true, that they may exempt themselves from personal responsibility, by using clear and explicit words to show that intention; but, in the absence of such words, the law will hold them bound. Thus, if an executor or administrator should make or indorse a note in his own name, adding thereto the words "as executor," or, "as administrator," he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate. Where a party signs a promissory note, with the addition to his name of the word "trustee," he is personally liable, nor can evidence be admitted to show that at the time of the execution of the note there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund. The rule is, that the written contract is considered the definitive agreement of the parties, and parol conversations and understandings are all merged in it. It is the only authentic evidence of the understanding of the parties. Nor will it do to say that the evidence is admissible, as showing a want of consideration

for the note. It does not tend to prove that there was no such consideration as is acknowledged by the terms of the note, but there was no such contract as that alleged. It is at last, the common case of an attempt to contradict the terms of a written contract by parol. 12 *Cal.* 168–171.

Executed by Wife.

SEC. 154. A married woman has no power to sign in her own name a promissory note, and execute a mortgage to secure its payment. 5 *Cal.* 458.

SEC. 155. Where the complaint avers that the note and mortgage sued on were made to E., a married woman, and by her assigned to plaintiff, he cannot recover, because the right to assign was in the husband; and this, too, where the proof was that both husband and wife assigned the note and mortgage. In chancery cases, the party must recover according to the pleadings, and not the proof, where there is a variance. 13 *Cal.* 490.

SEC. 156. *Prima facie*, property conveyed to or acquired by either spouse during the coverture, under our system, is common property, and the control and disposition of this common property is given by statute to the husband. The wife has no right to dispose of it. At common law, a note made payable to the wife, would, *prima facie*, be the property of the husband, who could indorse it in his own name. Probably, the indorsement of the wife was not necessary, but it did not hurt or make less effectual the indorsement of the husband. A party dealing with a *femme* is bound to inquire into her rights and powers. She or he is no more estopped by the fact that the papers are drawn directly to her than she or he would be bound to give effect to her sole deed if she were named as grantee in a conveyance of real estate. The case might be different if the husband expressly represented the wife to be a *femme sole*, and with authority to deal as such with the common property, or assented to the transfer by her; but the fact that a note or mortgage is executed to her is not conclusive proof of any such representation, for this is consistent with the right or title of the husband. 13 *Cal.* 493.

SEC. 157. The following is a form of promissory note:

Promissory Note.

...., ..., 18..

.... after date, without grace, ... promise to pay, in gold coin of the United States of America, to .... or order, the sum of .... dollars, with interest thereon at the rate of .... per cent. per month, from date [or, "from maturity"] until paid. Value received.

....

SEC. 158. The following is a form of promissory note payable at a bank or other particular place:

Promissory Note Payable at a Bank or other Particular Place.

$ ...., ..., 18..

.... days after date, for value received, I promise to pay to the order of ...., at the banking house of ...., ... dollars, gold coin of the United States of America.

....

SEC. 159. The following is a form of promissory note payable by installments:

Promissory Note Payable by Installments.

$ ...., ..., 18..

For value received, I promise to pay, in gold coin of the United States of America, to the order of ...., ... dollars, in .... months from date, and .... dollars in .... months from date, and .... dollars in .... years from date, said respective sums to bear interest from date at the rate of .... per cent. per month until paid. ....

SEC. 160. The following is a form of promissory note, joint and several:

Promissory Note, Joint and Several.

$ ...., ..., 18..

.... days from date, for value received, we, or either of us, promise to pay .... or bearer [or, "order"], in gold coin of the United States of America, ... dollars, with interest from date at the rate of .... per cent. per month until paid. ....

....

SEC. 161. The following is a form of promissory note not negotiable:

Promissory Note not Negotiable.

$ ...., ..., 18...

.... days from date, I promise to pay to ...., in gold coin of the

United States of America, ... dollars, with interest from .... at the rate of .... per cent. per month until paid.

....

SEC. 162. The following is a form of memorandum note of money deposited:

Memorandum Note of Money Deposited.

$ ...., ..., 18..

Deposited in the bank of ...., by ...., president of the bank of ...., in gold coin of the United States, ... thousand dollars, to be paid by said bank of .... to the order of said bank of ...., in like coin, when and in such amounts as may be demanded.

...., Teller. ...., Cashier.

SEC. 163. The following is a form of certificate of deposit:

Certificate of Deposit.

$ .... No. ....

..... Bank,
...., ..., 18..

.... has deposited in this bank .... dollars, in United States gold coin, payable in like coin to .... or order, on return of this certificate properly indorsed.

...., Teller. ...., Cashier.

SEC. 164. A check is, as has been shown, a written order or request, addressed to a bank or banker or other person, by a person having money deposited, requesting the payment, on presentment, of a certain sum of money to a person therein named or to his order, or to bearer. The following rules in reference to checks enunciated by the supreme court of California, as well as of other states, found in this chapter, may be recapitulated with advantage, as follows:

1st. When drawn payable to a person *or bearer*, it is transferable without indorsement, and the holder is entitled to payment.

2d. When drawn payable to a person *or his order*, it must be indorsed by the person to whom the check is made payable.

3d. When made payable to a person without the words, "or order" or "bearer," or to a particular person "only," it is not negotiable.

4th. As checks made payable to a person's order compel the payee to indorse them, they are, when drawn in this form, often used in lieu of receipts.

5th. The drawer of a check may countermand its payment at any time previous to its payment or acceptance by the bank.

6th. A check received from others should be presented without unnecessary delay, as the drawer will not otherwise be responsible for its payment in case of the failure of the bank.

7th. Every holder of a check is liable to every subsequent holder, only for the time for which he would be held if originally liable.

8th. A post-dated check is payable on the day of its date; but it is preferable to draw a check payable in the future; to date it on the day on which it is drawn and state in the body of the check the day when it is to be paid.

9th. When made payable on a future day and not on the day of its date, they have been, and usually are, treated as bills of exchange, and as such are entitled to days of grace.

SEC. 165. The following is a form of check payable at a future day:

Form of Check Payable at a Future Day.

...., ..., 18..

To the .... bank, ...

Pay to the order of ...., ... dollars, on the .... instant, without grace. Acceptance waived. ....

$ ....

[If acceptance be not waived, the payee should present the check at the bank, and cause the teller [or, other proper officer] to write across the face of the check the words: "good when properly indorsed," and sign his name officially.]

SEC. 165. The following a form of promissory note with collateral security:

Promissory Note with Collateral Security.

$ ...., ..., 18..

.. . . after date, without grace, ... promise to pay, in gold coin of the United States of America, to the order of ...., at their banking house in .... city, the sum of .... dollars, with interest thereon from date until paid at the rate of .... per cent. per month, the interest pay-

able monthly in advance, and if not so paid to be compounded and become a part of the principal, and bear thereafter the same rate of interest, for value received.

Due ...., 18.. ....
....

As collateral security for the payment of the above note and the interest to grow due thereon, ... have deposited with .... the following personal property, to wit: ....

And should the said note or any part thereof or the interest to grow due thereon, remain due and unpaid, after the same should have been paid, according to the tenor of said note, ... hereby irrevocably authorize and empower .... or their heirs, executors, administrators or assigns, to sell and dispose of the above-mentioned personal property or any part thereof, at public or private sale, without any previous notice to .... of such sale [or, after advertising the same .... days in the ....], and from the proceeds arising therefrom to pay the principal and interest and all charges that shall be then due and the costs of sale, and the balance, if any, to pay over to .... or .... representatives upon demand. In case of deterioration of any of the above securities, or fall in the market value of the same, ... hereby promise and agree to reduce the amount of debt or to increase the security in proportion to such deterioration or decrease of value, in default of which this note is to be considered due under the above stipulation. On the payment of the above note and interest, according to the terms of the former and all charges, this agreement is to be void and the above-named securities to be returned to ....

....
....

CHAPTER XXXIII.

CALLING OF CAUSE.

	SECS.		SECS.
WHEN CAUSE TO BE CALLED ...	1	THE RULE WHEN A PARTICULAR HOUR IS STATED.....	3
AFTER ONE HOUR'S DELAY JUSTICE MAY PROCEED TO GIVE JUDGMENT.....	2		

When Cause to be Called.

SECTION 1. The justice should wait an hour after a summons is returnable before proceeding to swear witnesses in the cause. 9 *Barb.* 60.

SEC. 2. Where, after issue joined, in a justice's court, the cause was adjourned to another day, and the justice waited a full hour after the time appointed for the appearance of the parties, it was held, that this was a reasonable

delay, and that he might proceed to call the parties and give judgment against the one who neglected to appear. 20 *Johns.* 309.

SEC. 3. So where a cause is held open to a particular hour on a subsequent day, the justice should wait an hour after the time specified for the parties to appear; and it is erroneous for him to call the cause in the absence of one of the parties, and proceed to the hearing thereof before the expiration of that time. 3 *Barb.* 372.

CHAPTER XXXIV.

CERTIORARI.

SECTION 1. At common law the writ of *certiorari* has nothing but the jurisdiction, and, incidentally, the regularity of the proceedings upon which the jurisdiction depends. The review never extends to the merits; upon these the action of the inferior tribunal is final and conclusive. Our statute is affirmatory of the common law. In this last respect (6 Cal. 679) *In the Matter of The People ex rel. Church* vs. *Hester*, is overruled. The return of the court below should, when necessary to determine a jurisdictional fact, exhibit every issue of law and fact involved in the question of jurisdiction and the evidence, as well as the record. *Whitney* vs. *Board of Delegates S. F. Fire Department*, 14 Cal. 479.

SEC. 2. On a writ of *certiorari* it is the duty of the justice to make his return of the testimony from his minutes and his best recollection. 4 *Wis.* 219.

SEC. 3. Where a justice, after having signed a return to a *certiorari*, made a supplementary return, and then made another return declaring the supplementary return incorrect, the court refused to receive the supplementary returns, and expressed their strong disapprobation of the practice of preparing returns to *certiorari* for justices, without their request, especially by the party applying or his attorney. 7 *Johns.* 548.

SEC. 4. It is not sufficient for the justice to return to a

writ of *certiorari* that the defendant in *certiorari* being satisfied that the judgment was erroneous, has discharged the same and paid costs; he must return all the proceedings had before himself. 3 *Wis.* 297.

SEC. 5. A *certiorari* to a justice's court is a new suit, and not the continuation of an old one, therefore the covenant of the surety for a non-resident plaintiff, on suing out a summons, to pay any sum that may be adjudged against the plaintiff in that suit does not extend to the costs of a reversal on *certiorari* of the judgment recovered by the plaintiff, before the justice, in the suit commenced by the summons. 4 *Denio*, 84.

SEC. 6. A justice's judgment for the plaintiff, on an action for goods sold and delivered, will be held good on *certiorari*, where the return shows that the defendant did not appear, although the return does not state that the justice waited one hour before proceeding with the cause, and the declaration does not show a venue, a precise statement of the cause of action and a formal promise to pay. 4 *Denio*, 182.

CHAPTER XXXV.

CHATTEL MORTGAGES.

SECTION 1. Chattel mortgages may be made on the following property to secure the payment of just indebtedness: Upholstery and furniture used in hotels and public boarding-houses, when mortgaged to secure the purchase money of the identical articles mortgaged, and not otherwise; saw mill, grist mill, and steamboat machinery, tools and machinery used by machinists, foundrymen, and other mechanics; steam boilers, steam engines, locomotives, engines and the rolling stock of railroads, printing presses and other printing material, instruments and chests of a surgeon, physician or dentist, libraries of all persons, machinery and apparatus for mining purposes. No mortgage made by virtue of this act shall have any legal force or effect (except between the parties thereto) unless the residence of

the mortgagor and mortgagee, their profession, trade or occupation, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage, and the mortgagor and mortgagee shall make affidavit that the mortgage is *bona fide*, and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage. *Gen. Laws*, 498.

SEC. 2. The seventeenth section of an act entitled "An act concerning fraudulent conveyances and contracts," passed April nineteenth, one thousand eight hundred and fifty, in so far as the same conflicts with the provisions of this act, is hereby repealed. *Gen. Laws*, 499.

SEC. 3. All mortgages made in pursuance of this act (with the affidavit attached), shall be recorded in the county where the mortgagor lives, and also in the county or counties where the property is located or used: *provided*, that property *in transitu* from the possession of the mortgagee to the county of the residence of the mortgagor, or to a location for use, shall, during a reasonable time for such transportation, be considered as located. It shall be the duty of the county recorders of this state to provide proper books of record and of index, in which they shall make a true copy or record of all mortgages made in pursuance of the provisions of this act, and left with them for record, and they shall enter, in alphabetical order, the names of the mortgagee and mortgagor in such index books. The recorder shall note on the mortgages and in the index books the time (in like manner as mortgages on real estate) when the same was received into the office for record, and the recording shall take effect from that time. The recorder's fees for recording and indexing shall be the same as are allowed him by law for like services for recording deeds of real estate, to be paid in advance by the person presenting the same for record. *Gen. Laws*, 500.

SEC. 4. No chattel mortgage shall be valid (except between the parties thereto), unless the same shall have been made, executed and recorded, in conformity to the provisions of this act: *provided*, however, if the mortgagee receives and retains the actual possession of the property mortgaged, he may omit the recording of his mortgage

during the continuance of such actual possession. *Gen. Laws*, 501.

SEC. 5. A right of redemption shall remain in the mortgagor until the same shall have been foreclosed by due process of law, or by agreement between the parties to the mortgage, which agreement shall be entered on the record of the mortgage, and for the entering of which the recorder shall be entitled to the same rate of fees as for recording the original, to be paid in advance by the parties to the mortgage. *Gen. Laws*, 502.

SEC. 6. 1st. All property mortgaged in pursuance to the provisions of this act may be attached at the suit of the creditors of the mortgagor or mortgagee. When attached at the suit of the creditor of the mortgagor, such creditor shall pay, or tender to the mortgagee, the actual amount due him on such mortgage before the officer making such attachment shall be entitled to the actual possession of such property. When property thus situated and thus redeemed shall have been sold by the officer by virtue of due legal proceedings, out of the proceeds of the sale he shall first pay to the creditor the amount advanced by him to pay the mortgagee with legal interest thereon.

2d. Pay all legal costs and fees appertaining to the judgment, execution and sale.

3d. Pay the judgment creditor the amount of the judgment, and any remaining surplus pay to the judgment debtor. If the creditor of the mortgagor prefers, he may cause to be attached the right of redemption of said mortgagor and cause the same to be sold, subject to the rights of the mortgagee. Such attachment shall be made by leaving a copy of the writ of attachment, with notice of the attachment, with the mortgagee. When the sale of such equity is made on an execution obtained by such attaching creditor, the sum realized shall be applied to the payment of costs, fees, discharge of the execution and any remainder paid to the judgment debtor. When the interest of the mortgagee shall be attached, a copy of the writ of attachment shall be left with the mortgagor with notice of the attachment, and any payment made by him to the mortgagee after such notice shall not release the attachment or

affect the rights of the attaching creditor, but said mortgagor may pay the amount due on said mortgage to the officer who made the attachment, and thereupon said officer shall release said attachment and hold the money so paid him, in the same manner as if he had originally attached said money. *Gen. Laws*, 503.

SEC. 7. This act shall not be so construed as to interfere or conflict with the lawful mining rules, regulations or customs, in regard to the locating, holding or forfeiture, of claims, but in all cases of mortgages of mining interests under this act the mortgagee shall have the right to perform the same acts that the mortgagor might have performed for the purpose of preventing a forfeiture of the same under the said rules, regulations or customs, of mines, and shall be allowed such compensation therefor as shall be deemed just and equitable by the court ordering a sale upon a foreclosure: *provided*, that such compensation shall in no case exceed the amount realized from the claim by a foreclosure and sale. *Gen. Laws*, 504.

SEC. 8. The mortgagee in all mortgages made under this act shall be allowed one day for every twenty miles of the distance between his residence and the county recorder's office, where such mortgage ought by law to be recorded, to conform to the provisions of this act, before any attachment shall be valid made by the creditors of the mortgagor. *Gen. Laws*, 505.

SEC. 9. Section eight of the act, approved April 29th, 1857, entitled "An act amendatory of and supplemental to an act in relation to personal mortgages in certain cases," passed May 11th, A.D. 1853, is hereby repealed. Nothing contained in said act or in the act of which said act is amendatory shall be construed to apply to or shall affect in any manner any bill of sale, mortgage, hypothecation or conveyance, of any vessel or part of any vessel which is or shall be duly recorded in the office of the collector of customs of the place where such vessel is registered or enrolled pursuant to the laws of the United States. *Pub. Laws*, 1868.

SEC. 10. If the property is not such as could be mortgaged under the provisions of the chattel mortgage act,

and the mortgage is not executed with reference to that act, its effect is to be determined by the rules of the common law; and it is a well-settled rule of that law, that a mortgage of personal property entitles the mortgagee to the possession. 20 *Cal.* 617, 618.

SEC. 11. A mortgage of chattels, the possession remaining in the mortgagor, is good against all persons except subsequent purchasers and *bona fide* creditors. The title vests in the mortgagee, subject to be divested on compliance with the conditions. 14 *Cal.* 85.

SEC. 12. A chattel mortgage, under the act of 1857 and the amendment of 1861, is of no validity except between the parties thereto, unless the provisions of the act are strictly complied with. *Gassner* vs. *Patterson*, 23 Cal. 299.

SEC. 13. A sale of personal property, made to secure the indebtedness of the vendor to the vendee, makes the transaction a mortgage. *Moore* vs. *Murdock*, 26 Cal. 514.

SEC. 14. *Hotel Furniture.*—To render a chattel mortgage, given to secure the purchase money of furniture and upholstery for a hotel or boarding-house valid, it must appear that the furniture and upholstery were actually used in a hotel or boarding-house. *Stringer* vs. *Davis*, 30 Cal. 318.

SEC. 15. A mortgage on growing crops executed, acknowledged and recorded, like mortgages on real estate, is valid as against third parties, without delivery of possession of the property mortgaged. *Quiriaque* vs. *Dennis*, 24 Cal. 154.

SEC. 16. The lien of such a mortgage ceases as against subsequent purchasers after the crop is harvested, unless when harvested it is delivered to the mortgagee. 24 *Cal.* 154.

SEC. 17. A mortgagee may sell the property mortgaged upon reasonable notice to the mortgagor of the time and place of sale after conditions broken. *Wilson* vs. *Brannan*, 27 Cal. 258.

SEC. 18. *Redemption by Mortgagor.*—The mortgagor may redeem the property at any time before foreclosure or by sale at auction. 27 *Cal.* 258.

SEC. 19. The following is a form of chattel mortgage:

Chattel Mortgage.

This indenture, made the .... day of ...., in the year of our Lord one thousand eight hundred and ...., between ...., residing at ...., in the county of ...., state of ...., and by profession, trade or occupation, a ...., the party of the first part, and ...., and residing at ...., county of ...., state of ...., and by profession, trade or occupation, a ...., the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of .... dollars, ... of the United States, to ...., in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over, unto the said party of the second part, all those certain goods and chattels, now being in ...., state of, and described as follows, to wit: [here give description of goods or chattels].

To have and to hold, all and singular the said good and chattels above bargained and sold, or intended so to be, unto the said party of the second part, ... executors, administrators and assigns, forever: *provided*, nevertheless, and these presents are upon this express condition, that if the said party of the first part, ... executors, administrators or assigns, shall well and truly pay unto the party of the second part, ... executors, administrators or assigns, the sum of .... dollars .... of the United States, on the.... day of ...., A.D. 18.., at the .... of ...., in the ...., county of ...., state of ....; and shall further pay in .... of the United States, unto the said party of the second part, ... executors, administrators or assigns, interest upon the said principal sum at and after this date, at the rate of .... per cent. per ...., on the .... day of ...., at said ...., of ...., in the said .... county of ...., then these presents shall be void. But in case default shall be made in the payment of the said principal sum, or any one of the said installments or interest, then it shall and may be lawful for and the said party of the first part does hereby anthorize and empower the said party of the second part, ... executors, administrators or assigns, with the aid and assistance of any person or persons, to enter .... dwelling-house, ... store and other premises, and such other place or places, as the said goods or chattels are or may be placed, and take and carry away the said goods and chattels, and sell and dispose of the same, for the best price they can obtain, by due process of law, or by agreement between the parties to this mortgage, their executors, administrators or assigns, which agreement shall be entered on the record of the mortgage, and out of the money arising therefrom, to retain and pay the said sum above-mentioned, and interest as aforesaid, and all charges touching the same, and counsel fees not to exceed .... per cent. upon the full amount which shall then be due, rendering the overplus, if any, unto the said party of the first part, or to .... executors, administrators or assigns. And until default be made in the payment of the said sum of money, the said party of the first part, ... executors, administrators and assigns, may remain and continue in the quiet and peaceable possession of said goods and chattels, and in the full and free use and enjoyment of the same.

In witness whereof, the said party of the first part has hereunto set .... hand and seal the day and year first above written. .... [L.S.]

Signed, sealed and delivered, in the presence of

....

State of..... } ss.
county of..... }

...., of the county of ...., being .... duly sworn ...., says, that .... is the mortgagor named in the foregoing mortgage; and that the said mortgage is *bona fide* and made without any design to defraud or delay creditors. ....

Subscribed and sworn to before me, this .... day of .... A.D. 18..

....

State of ....., } ss.
county of..... }

...., of the county of ...., being duly sworn, ... says that .... is the mortgagee named in the foregoing mortgage; and that the said mortgage is *bona fide* and made without any design to defraud or delay creditors. ....

Subscribed and sworn to before me, this .... day of ...., A.D. 18..

....

CHAPTER XXXVI.

CLAIMS AGAINST THE ESTATES OF DECEASED PERSONS.

SECTION 1. Every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper published in the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the deceased, requiring all persons having claims against the deceased to exhibit them with the necessary vouchers, within ten months after the first publication of the notice to such executor or administrator, at the place of his residence or transaction of business, to be specified in the notice; such notice shall be published as often as the judge or court shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resign or be removed, before the expiration of the ten months after the first publication of such notice, his successor shall give such notice only for the unexpired portion of the ten months. *Pr. Act*, 128.

SEC. 2. The term "claims," as used in the probate act,

has reference only to such debts or demands as might have been enforced against testator in his lifetime by personal action for the recovery of money, and upon which only a money judgment could have been rendered. 21 *Cal.* 32.

SEC. 3. Claims against an estate may be presented to the executor or administrator thereof *before* his publication of notice to creditors to present their claims. 19 *Cal.* 331.

SEC. 4. Where the executor or administrator has property which belongs to another, the owner is not required to present his account as if he were a creditor. The claimant of specific *property*, and not of a *debt*, cannot properly be called a *creditor*, within the meaning of the probate law. 9 *Cal.* 658.

SEC. 5. If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever: *provided*, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute; and, *provided* further, that when it shall be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice as provided in this act, by reason of being out of the state, it may be presented any time before a decree of distribution is entered. *Probate Pr. Act*, 130.

SEC. 6. Every claim presented to the administrator shall be supported by the affidavit of the claimant, that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same, to the knowledge of the claimant or other affiant: *provided*, that when the affidavit is made by any other person than the claimant, he shall set forth in the affidavit the reasons it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs, to be produced in support of the claim; the amount of interest shall be computed and included in the statement of the claim, and the rate of interest determined. In case the estate is insolvent, no claim contracted after the passage of this act shall bear greater interest than ten per cent. per annum from and after the time of issuing letters. *Probate Pr. Act*, 131.

SEC. 7. When a claim accompanied by the affidavit required in the preceding section has been presented to the executor or administrator, he shall indorse thereon his allowance or rejection, with the day and date thereof; if he allow the claim it shall be presented to the probate judge for his approval, who shall in the same manner indorse upon it his allowance or rejection. If the executor or administrator or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim shall have been presented to him, such refusal or neglect may be deemed equivalent to a rejection; and if the presentation be made by a notary, the certificate of such notary, under seal, shall be *prima facie* evidence of such presentment and rejection; if the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same may be held valid, though acted upon by the executor or administrator and by the judge, after the expiration of such time. *Probate Pr. Act*, 132.

SEC. 8. In regard to claims not due at the date of the first publication of notice to creditors, the supreme court say:

1st. Under the one hundred and thirtieth section of the act of 1851, relative to the estates of deceased persons, claims against an estate which are due *must* be presented to the person having charge of the estate as executor or administrator within the time allowed, or they will not constitute a charge against the estate.

2d. Contingent claims and claims not due do not come within the first clause of section one hundred and thirty above-named; they may be presented to the executor, etc., within ten months after becoming due or absolute. But after becoming due or absolute they *must be presented* according to the statute.

3d. Under the two hundred and forty-fourth section of the statute a contingent claim *may be presented* to the probate judge, without the affidavit required by section one hundred and thirty-one of the probate practice act; and the effect might be to cause the money to which the party may be prospectively entitled to be paid in court. But this does not relieve the party from the necessity of presenting such

claim to the executor after it becomes absolute, with the proper affidavit, before he can be compelled to act on it.

4th. The statute does not provide for the approval of a contingent claim; and when such a claim is presented to the executor and the probate judge, and is by them allowed, such allowance does not give validity to the claim as a judgment against the estate.

5th. No presentation of a claim to an executor is effectual without an affidavit of its justness.

6th. The allowance of a claim due, and not contingent, by the executor, and its approval by the probate judge, according to the statute, fixes the obligation upon the estate as a judgment.

7th. A claim, verified and filed with the county clerk, but not presented to the executor, is no charge upon the estate. *Pico* vs. *De La Guerra*, 18 Cal. 422.

SEC. 9. When a claim is rejected either by the executor or administrator or the probate judge, the holder shall bring suit in the proper court against the executor or administrator, within three months after the date of its rejection, if it be then due, or within three months after it becomes due, otherwise the claim shall be forever barred. *Probate Pr. Act*, 134.

SEC. 10. No claim shall be allowed by the executor or administrator, or by the probate judge, which is barred by the statute of limitations. When a claim shall be presented to the probate judge for his allowance, he may, in his discretion, examine the claimant and other persons on oath touching the validity of the claim, and may hear any other legal evidence in relation thereto. *Probate Pr. Act*, 135.

SEC. 11. No holder of any claim against an estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator. *Probate Pr. Act*, 136.

SEC. 12. The word "claim," in section one hundred and thirty-six, probate act, is sufficiently comprehensive to exclude every species of charge or account against an estate, whether the same be recorded or not. The intention was undoubtedly to protect the estates of deceased persons from harassing and expensive litigation, until such a period

as the administrator or executor could secure the assets for the purpose of liquidating the claims, and this intention could only be carried out by applying the rule to all demands or claims whatever. 6 *Cal.* 393.

SEC. 13. When a judgment has been recovered, with costs, against any executor or administrator, the executor or administrator shall be individually liable for the costs, but they shall be allowed him in his administration accounts, unless it shall appear that the suit or proceeding in which the costs were taxed shall have been prosecuted or resisted without just cause. *Probate Pr. Act*, 144.

SEC. 14. If the executor or administrator is himself a creditor of the testator or intestate, his claim, duly authenticated by affidavits, shall be presented for allowance or rejection to the probate judge, and its allowance by the judge shall be sufficient evidence of its correctness. *Probate Pr. Act*, 145.

SEC. 15. The claim of an executor or administrator must be presented to the probate judge within ten months after the publication of notice for the presentation of claims. 10 *Cal.* 482.

SEC. 16. The time during which there shall be a vacancy in the administration shall not be included in any limitations herein prescribed. *Probate Pr. Act*, 137.

SEC. 17. If an action be pending against the testator or intestate at the time of his death, the plaintiff shall in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases, and no recovery shall be had in the action unless proof be made of the presentments. *Probate Pr. Act*, 138.

SEC. 18. Whenever any claim shall be presented to any executor or administrator or to the probate judge, and he shall be willing to allow the same in part, he shall state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action which he may bring against the executor or administrator, unless he shall recover a greater amount than that offered to be allowed. *Probate Pr. Act*, 139.

SEC. 19. The effect of any judgment rendered against any executor or administrator, upon any claim for money against the estate of his testator or intestate, shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment shall be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the judgment shall be filed in the probate court. No execution shall issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment. *Probate Pr. Act*, 140.

SEC. 20. When any judgment has been rendered against the testator or intestate in his life; no execution shall issue thereon after his death; but a certified copy of such judgment shall be presented to the executor or administrator and be allowed and filed or rejected, as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied shall be paid in due course of administration: *provided*, however, that if the execution shall have been actually levied upon any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands. The executor or administrator may, however, require the affidavit of the claimant or other satisfactory proof, that the judgment or any portion thereof, is justly due and unsatisfied. *Probate Pr. Act*, 141.

SEC. 21. The following is a sufficient form for the presentation of a claim against the estate of a deceased person, whether the same be a promissory note or account. It should, if it be an account, be made out from the journal or day-book, because it is proper that the items of the account should be given and the date of delivery be correctly noted:

Creditor's Claim.

In the probate court of the county of ....., state of .....

In the matter of the estate of ...., deceased.

Letters of administration on the estate of ...., deceased, having

been granted to .... [or, "letters having been granted to ...., as executor of the last will and testament of ...., deceased"], the undersigned, creditor of said deceased, presents ..... claim against the estate of said deceased, with the necessary vouchers, to said administrator [or, "executor"] for approval, as follows, to wit:

Estate of ...., deceased,

To ...., Dr.

State of .....,
county of ..... } ss.

...., whose foregoing claim is herewith presented to the administrator [or, "executor"] of said deceased, being duly sworn, says the amount thereof, to wit: the sum of ..... dollars, is justly due to said claimant; that no payments have been made thereon, and that there are no offsets to the same to the knowledge of said claimant.

Subscribed and sworn to before me, this .... day of ...., A.D. 18..

....

CHAPTER XXXVII.

ACTIONS TO RECOVER POSSESSION OF PERSONAL PROPERTY.

	SECS.		SECS.
When Replevin Lies.....	1- 6	Effect of the Undertaking..	33
When Previous Demand Necessary.....	7-15	When Defendant is Entitled to Return of Property after Judgment.....	34
The Pleadings.....	16-17	Defendant's Exception to Sureties on Undertaking	35
The Judgment.....	18-20	When Defendant may require Return of Property.....	36
When Property Cannot be Taken under Execution.	21	Form of Undertaking on Return to Defendant.....	37
Measure of Damages.....	22	Justification of Defendant's Sureties.....	38
Claim of Delivery of Property before Answer....	23	Form of Certificate of Justification..,.....	39
What Affidavit must Show..	24	How Officer to Take and Keep Property.....	40
Form of Affidavit.....	25	Claims by Third Persons....	41
Order to Constable to take Property.....	26	Officer's Return.....	42
Form of Order.....	27		
Duty of Officer.....	28		
Form of Plaintiff's Undertaking.....	29		
Suits on the Undertaking...	30-32		

When Replevin Lies.

SECTION 1. Replevin lies for all goods and chattels unlawfully taken or detained, and may be brought whenever

one person claims personal property in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession. 22 *Cal.* 139.

SEC. 2. Under our system, probably an action can be maintained upon any title, legal or equitable, or upon an instrument sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendant. 13 *Cal.* 33.

SEC. 3. Against the cutting of timber the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes the kind of waste the commission of which a court of equity will, upon petition, restrain. When once cut the character of the property is changed; it has ceased to be a part of the realty and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value as upon an implied contract of sale. 16 *Cal.* 578.

SEC. 4. A party should not be denied the right of action for his property, and the right of recovery against any one, whether a sheriff or not, unless it be held by legal process against himself. 3 *Cal.* 470.

SEC. 5. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same and gave C in exchange a receipt for the same, and transferred it on his warehouse books to the account of C, but did not separate any specific portion from the flour of A, as the property of B, and the whole was subsequently seized in an action against A: It was held, that the sheriff was not liable to C, in the absence of segregation of the flour, but that B was estopped by his receipt from denying his liability.

6 *Cal.* 68. This action being for the recovery of specific property, it was necessary to show, as against the sheriff, that the portion claimed by the plaintiffs had been severed and designated from the bulk out of which it was sold; otherwise, there was no mode of identification. This resulted from the nature and character of the action. But in favor of B the same reasoning could not be invoked. He was a warehouseman and gave his receipt for a specific quantity of flour. He was estopped from denying his liability. 6 *Cal.* 71.

SEC. 6. Action, in the nature of replevin, to recover eighteen hundred dollars taken by the defendant as sheriff, under process, as the property of one McCormick. McCormick was a witness, and testified that this money was taken from a safe in his possession belonging to Wells, Fargo & Co., who had four hundred dollars in the safe, the balance being the money of plaintiff. McCormick was present at the levy of the officer, and was agent for Wells, Fargo & Co., and when the plaintiff made the claim for the money taken, interposed no objection. The supreme court say: The ground taken by defendant on appeal is that there was no segregation of this money sued for from the mass in the safe, so as to enable the plaintiff to bring and maintain his suit. But the position, however plausible, is not sustained. As McCormick was the agent of Wells, Fargo & Co., to keep their money, he had authority to retain it in their safe, the proper place of its deposit, and when he recognized the claim of the plaintiff, before the eighteen hundred dollars was taken away, to the latter sum, it was as if he had elected for Wells, Fargo & Co. to hold the four hundred dollars as theirs. It was, in other words, as if a division and allotment had been made of the money in the safe according to the respective rights of the owners. At least, there was evidence enough to go to the jury as to this matter of severance, and the court did not err in refusing a nonsuit. 14 *Cal.* 412, 413.

When Previous Demand Necessary.

SEC. 7. If the original possession of property is acquired

by a tort, no demand previous to the institution of a suit for its recovery is necessary. 23 *Cal.* 359; 12 *Cal.* 483.

SEC. 8. In an action by A against a sheriff for seizing the property of A in the hands of B, as the servant of A, on an execution against B, no demand is necessary before bringing suit, the plaintiff being deemed to be in possession of the property at the time of the levy through his servant—the sheriff had notice that the property was owned by the plaintiff, the original taking being therefore tortious. The psssession of a servant is the possession of a master for the purpose of maintaining trespass (1 *Chitty's Pl.* 194); and the same rule applies in an action of replevin in the *cepit.* 3 *Hill,* 348; 1 *Cal.* 161.

SEC. 9. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required. 12 *Cal.* 483.

SEC. 10. A sale effected by fraud works no change of property. The wares must be considered as remaining in the vendors as the original owners. This being so, the civil remedies of the party defrauded are clear, viz: trover or replevin in the *detinet* or trespass, or replevin in the *cepit,* at his election. Trover will lie without demand and refusal, because the original taking is tortious. The general and absolute ownership still remains in the vendor or bailor; and not only the original interference with the property on the part of the vendee or bailee but any subsequent acts of ownership on his part may be considered as an unlawful or tortious taking. The general owner holds the constructive possession of personal property; and this is sufficient to maintain trespass, though the actual possession be in another. Where the owner consented to the taking it would undoubtedly be a sufficient answer. But consent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress or, sometimes, even mistakes. 12 *Cal.* 462, 463.

SEC. 11. *Demand, its purpose in Trover and Replevin.*—The only purpose of proving a demand in the actions of trover and replevin is to show the defendants wrongful. *Whitman G. & S. M. Co.* vs. *Tuttle,* 4 Nev. 494.

SEC. 12. *When Demand for Personal Property Unnecessary.*

—When the owner of personal property does not part with it voluntarily, but it is tortiously taken from his possession, or any act is done which makes the possession of the person having it wrongful, no demand is necessary to be shown to entitle the owner to a recovery of it. 4 *Nev.* 494.

SEC. 13. *Demand not Indispensably Necessary.*—In an action of replevin it is not indispensably necessary to show a demand upon the defendant to return the property before suit brought. A demand serves no purpose, except to establish a conversion or a wrongful detention. When that can be established without showing a demand, a demand is unnecessary. Justice Johnson dissenting. *Pefkins* vs. *Barnes*, 3 Nev. 557.

SEC. 14. When, therefore, the defendant in his answer admits the detention and claims title in himself, the title alone is put in issue and no demand need be shown. Justice Johnson dissenting. 3 *Nev.* 557.

The Pleadings.

SEC. 15. An allegation in the complaint of the place where the property was taken, in an action to recover possession of personal property, is surplusage. 25 *Cal.* 545.

SEC. 16. In such action to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff. The judgment of return is in the nature of a cross judgment, and there must be some appropriate averments in the pleadings to put in issue the facts upon which the relief is given. 13 *Cal.* 430, 431.

SEC. 17. *Admission of the Value of Goods.*—In an action for the conversion of chattels alleged by plaintiff to be of a certain value, defendant denied that they were of such value, or of any greater value than a certain less sum named: *Held*, that this was an admission that they were worth the less sum named. *Carlyon* vs. *Lannan*, 4 Nev. 156.

The Judgment.

SEC. 18. In an action of replevin by W. it appeared on

the trial that the property sued for belonged to him and one F., a third party, and the jury returned a general verdict for the defendants, and the court gave judgment for a return of the property to the defendants; it was held, that there was no error in the judgment. This right of return is not necessary, or, perhaps, at all dependent upon any finding of the jury to that effect; but the results as matter of right in the plaintiff and a conclusion of law from the verdict for defendants. It is the right of the court to state this legal conclusion as a portion of its judgment. The legal effect of a finding for the defendants on the question of the plaintiff's right to the property, is to entitle the defendants, from whom it was taken, to its restoration. Nor is there anything in the failure to give an alternative judgment for the value of the property. This omission might be complained of by the defendants if they had shown the value; but it is no ground of complaint on the part of the plaintiff. 10 *Cal.* 379, 380.

SEC. 19. Where damages are also claimed for the detention of personal property, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. 15 *Cal.* 213.

SEC. 20. The case of *Wratten* vs. *Wilson* was an application to the district court for a writ of *certiorari* to the county court of Sonoma county. The affidavit of the defendant, Wilson, who applied for the writ, averred that one Boggs, a justice of the peace, rendered a judgment in the action in favor of the plaintiff against the defendant; that he appealed therefrom to the county court, where judgment was again rendered against him; that the complaint in the action was for the recovery of personal property of the alleged value of one hundred and sixty-seven dollars and fifty cents, and it prayed for judgment for the possession of the property or the value thereof, to wit: one hundred and sixty-seven dollars and fifty cents, together with two hundred dollars damages and costs of suit. The district court issued the writ and rendered a judgment reversing, setting aside and annulling, the judgment of the county court, and for costs against the plaintiff, from which he appealed. The supreme

court say: "The affidavit upon which the application for the writ of *certiorari* as founded is insufficient, as it does not set forth the amount of the judgments rendered either by the justice of the peace or the county court. That was an essential fact necessary to be averred in order to show that they had exceeded their jurisdiction. The district court, therefore, erred in granting the order for the writ. The proceedings before the justice of the peace and in the county court were set forth in the return to the writ, by which it appears that the former rendered a judgment for fifty-seven dollars and fifty cents, and the latter for twenty dollars and costs. They did not therefore exceed their jurisdiction in rendering these judgments, and the mere fact that the plaintiff in his complaint prayed for the recovery of the property or its value, one hundred and sixty-seven dollars and fifty cents, with two hundred dollars damages and costs, did not render the judgments they entered an excess of jurisdiction. The prayer for damages might have been stricken out or disregarded. It ought not to have turned him out of court. *Van Etten* vs. *Gilson*, 6 Cal. 19. The district court therefore erred in reversing the judgment. The judgment of the district court was reversed, and the proceedings relating to the writ of *certiorari* were dismissed at the cost of the respondent." 22 *Cal.* 467, 468.

When Property Cannot be Taken under Execution.

SEC. 21. Where A commences a suit against B to recover possession of personal property, and before the suit is commenced, B has sold the property to C, if A recovers judgment, the property cannot be taken from C under an execution issued on the judgment for its delivery. 24 *Cal.* 419.

Measure of Damages.

SEC. 22. In the case of *Dorsey et al.* vs. *Manlove* (14 Cal. 553), the subject of the measure of damages was fully discussed, and the following rules were announced:

1st. In actions for taking and detaining personal property, the measure of damages is the value of the property, with interest, unless circumstances of aggravation are shown.

2d. If circumstances of aggravation are shown for the purpose of increasing the damages, then the defendant may show circumstances explanatory of his motives and intentions.

3d. The rule of damages beyond the value of the property and interest, depend on the presence or absence of circumstances of aggravation in the trespass: as, fraud, malice or oppression.

4th. In the absence of such circumstances the rule is compensation merely, which means, solely, the injury done to the property, and not to collateral or consequential damages resulting to the owner.

5th. When the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages.

6th. If the trespass be committed by an officer—sheriff or constable—under and by the authority of a writ which is void, yet if there be no circumstances of aggravation in his motives or manner of executing the writ, the rule of compensation merely applies.

Claim of Delivery of Property before Answer.

SEC. 23. The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons or at any time before answer, claim the delivery of such property to him, as provided in this chapter. *Pr. Act*, 556; *Gen. Laws*, 5487.

What Affidavit must Show.

SEC. 24. When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1st. That the plaintiff is the owner of the property claimed [particularly describing it], or is lawfully entitled to the possession thereof.

2d. That the property is wrongfully detained by the defendant.

3d. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4th. That the same has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution, on an attachment against the property of the plaintiff, or if seized that it is by statute exempt from such seizure.

5th. The actual value of the property. *Pr. Act*, 557; *Gen. Laws*, 5488.

Form of Affidavit on Claim and Delivery of Personal Property.

SEC. 25. The following is a form of affidavit on claim and delivery of personal property:

In the justice's court of ..... township, in the county of ....., state of .....

....,
plaintiff,
against
....,
defendant.

State of .....,
county of ..... } ss.

.... of said county, being duly sworn, says: That he is the plaintiff in the above-entitled action; that the said plaintiff is the owner of and is lawfully entitled to the possession of the following personal property, to wit: [description of the property]; that the said property is in the possession of and wrongfully detained by the defendant in said action, and that the alleged cause of said detention, according to this affiant's best knowledge, information and belief, is as follows, to wit: [state the cause of detention]; that the said property, or any part thereof, has not been taken for a tax, assessment or fine, pursuant to statute or seized under an execution, or an attachment against the property of the said plaintiff, and that the actual value of the said property is ... hundred dollars. ....

Subscribed and sworn to before me, this .... day of ....., A.D. 18 ...

....,
Justice of the peace of said township.

Order to Constable to take Property.

SEC. 26. The justice shall thereupon, by an indorsement in writing upon the affidavit, order the sheriff or a constable of the county to take the same from the defendant, and deliver it to the plaintiff, upon receiving the undertaking mentioned in the following section. *Pr. Act*, 558; *Gen. Laws*, 5489.

Form of Order to Constable to Take Property, to be Indorsed on Affidavit.

SEC. 27. The following is a form of order to constable to take property, to be indorsed on affidavit:

The people of the state of ...., to the sheriff or any constable of the county of ...., greeting:

You are hereby ordered to take the within-described property from the within-named defendant, and deliver the same to the within-named plaintiff upon receiving a written undertaking, executed by two or more sufficient sureties, approved by you, to the effect that they are bound in double the value of the said property, as stated in the within affidavit, for the return of the said property to the said defendant, if return thereof be adjudged, and for the payment to the said defendant of such sum as may, for any cause, be recovered against the said plaintiff.

Witness my hand, this .... day of ...., A.D. 18..

....,
Justice of the peace.

Duty of Officer.

SEC. 28. Upon the receipt of the affidavit and order, with a written undertaking, executed by two or more sufficient sureties, approved by the officer, to the effect that they are bound in double the value of the property, as stated in the affidavit, for the prosecution of the action for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the officer shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, order and undertaking, by delivering the same to him, personally, if he can be found within the county or to his agent, from whose possession the property is taken, or if neither can be found within the county, by leaving them at the usual place of abode of either within the county with some person of suitable age and discretion, or if neither have any known place of abode within the county, by putting them into the nearest post-office, directed to the defendant. *Pr. Act*, 559; *Gen. Laws*, 5490.

Form of Undertaking on Claim and Delivery of Personal Property.

SEC. 29. The following is a form of undertaking on claim and delivery of personal property:

In the justice's court of .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

Whereas, the plaintiff in the above-entitled action has this day filed his complaint in the above-named court against the defendant in said action, claiming the delivery of [description of the property]:

Now, therefore, we, ..., as principal, and .... and ...., as sureties, do hereby agree and undertake, and are bound, in consideration of said delivery, in the sum of ..... dollars, for the prosecution of the action for the return of the said property to the said defendant, if return thereof be adjudged by the said court, and for the payment to the said defendant of such sum as may, for any cause, be recovered against the said plaintiff, not exceeding the sum of ..... dollars.

In witness whereof, we have hereunto set our hands and seals, this ..... day of ....., A.D 18..

.... [L.S.]
.... [L.S.]
.... [L.S.]

State of ....., county of ..... } ss.

.... and ...., the sureties in the within undertaking, being duly sworn, say, each for himself and not one for the other: That he is a resident and freeholder within the said county, and is worth double the amount stated in the said undertaking over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me, this .... day of ...., A.D. 18..

....., Justice of the peace.

Form of Approval by the Officer.

The within undertaking is hereby approved by me, this .... day of ...., A.D. 18..

....., Constable.

Suits on the Undertaking.

SEC. 30. Where the plaintiff in replevin gives the statutory undertaking and takes possession of the property in suit, and is afterwards nonsuited and judgment entered against him for the return of the property and for costs, his sureties are liable for damages sustained by the defend-

ant by reason of a failure to return the goods, but not for damages for the original taking and detention, the value of the goods not having been found by the jury. The facts which upon a trial by jury would have been found in the original replevin suit, are, by a nonsuit therein, left to the jury called in the suit on the undertaking, so far as the conditions of the undertaking will authorize an inquiry into them. 8 *Cal.* 446.

SEC. 31. In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. 11 *Cal.* 262.

SEC. 32. The case of *Mills et al.* vs. *Gleason et al.* was a suit upon an undertaking executed in an action of replevin, brought by one Gould against the present plaintiffs, the object being to obtain possession of the property pending the action. A question was raised as to whether the value of the property could be recovered as damages, the counsel for the appellants insisting that the damages were to be measured by the judgment in the action of replevin. The undertaking was conditioned "for the prosecution of the action for the return of the property to the defendants, if return thereof be adjudged, and for the payment to them of such sum as may for any cause be recovered against the plaintiffs." The action was dismissed for want of prosecution, and a judgment entered in favor of the defendants for costs, and the position taken was that the amount of this judgment constituted the measure of the relief to be administered. The supreme court say: There are several decisions of this court holding that a defendant in replevin, in order to render the sureties upon the undertaking liable for the value of the property, must demand a return in the answer, and obtain a judgment directing it. In *Chambers* vs. *Waters* (7 Cal. 390), the court said: "In the case between Waters and Hill, if the latter intended to hold Waters and his sureties responsible upon the undertaking, either for a return of the property or its value, he should have claimed a return, and taken his judgment accordingly. Having failed to do this, the payment of the judgment, as taken, is a complete discharge," etc. There are other cases to the same effect; but in *Ginica* vs. *Atwood* (8 Cal. 446), where a

nonsuit had been granted, it was held that section one hundred and seventy-seven of the practice act, upon which the previous decisions were based, did not apply. The section provides that "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property." A dismissal stands upon the same footing as a nonsuit, leaving the parties to settle in an action upon the undertaking those matters which, if the original suit were prosecuted, it would be necessary to determine in the first instance. Such matters include, of course, the right of the defendant to a return of the property, and as the opportunity to obtain a judgment for its return is taken away by the failure to prosecute, he is entitled to compensation in damages. A failure to prosecute is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained. In this case, it appears that a return of the property was not demanded in the replevin suit, but we think the defendants are not in a position to take advantage of this point. The suit was not tried, but abandoned and dismissed, and under the circumstances it is immaterial what the pleadings in the case were. 21 *Cal.* 279, 280.

Effect of the Undertaking.

SEC. 33. The effect of a replevin bond under our statute is not to divest either the title or the lien of the other party. The contest itself is about specific personal property. The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit. The value is recovered only as an alternative when delivery of the specific property cannot be had. The property is required to be particularly described in the execution. If the title could be

divested by the delivery of the bond, the primary object of the suit could be defeated. The unsuccessful party could always make his election to keep the property or pay the value. But this advantage was never intended to be given by the statute to the party confessedly in the wrong. The effect of the bond is simply to give the party the possession of the property pending the litigation. The possession is only temporary. It does not divest the title or discharge any prior lien. The title is not changed. No sale made by the party in possession can convey any title to the purchaser. And if the title is not changed, neither could any prior lien be effected in any way. The language of our statute is very strong. The sheriff is commanded to deliver the possession of the property particularly described in the execution, and if a delivery cannot be had, then to make the assessed value. There is no reservation anywhere in favor of innocent purchasers. The property remains in the custody of the law, and all parties must take notice. It is certain that the unsuccessful party may deliver the property and discharge himself from so much of the judgment as is made up by the assessed value. The very reason why he may do this is because the suit is about that specific property, and because the title is not affected by the replevin bond. But where property attached is released upon the bond of the defendant, he cannot discharge himself or his sureties by a delivery to the sheriff of the same property, for the reason that the lien is gone. 11 *Cal.* 277–279.

When Defendant entitled to Return of Property after Judgment.

SEC. 34. W. sued R. to recover certain personal property, and at the time of commencing the action upon the usual affidavit, bond and order, procured the property to be taken from the defendant and delivered to him. From the pleadings and evidence, it appeared that the property had been mortgaged by W. to R. to secure a loan, and that after the commencement of the action, plaintiff had tendered to R. the amount of the debt and interest, and was still ready to pay the same; it was held, that R. being a mortgagee was entitled to the possession of the property when the action was commenced, and that he should have

judgment in his favor for costs, but that under the offer of plaintiff to pay the mortgage debt, R. was not entitled to a judgment for the return of the property to him. 20 *Cal.* 615. Where the defendant in a replevin suit failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against plaintiffs for costs, which was paid: it was held, that the payment of the judgment, as taken, was a complete discharge of plaintiff's sureties in the undertaking. 7 *Cal.* 390.

Defendant's Exceptions to Sureties on Undertaking.

SEC. 35. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the officer that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify on notice before the justice; and the officer shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section. *Pr. Act*, 560; *Gen. Laws*, 5491.

When Defendant may Require Return of Property.

SEC. 36. At any time before the delivery of the property to the plaintiff the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the officer a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter. *Pr. Act*, 561; *Gen. Laws*, 5492.

Undertaking on a Return to Defendant on Claim and Delivery of Personal Property.

SEC. 37. The following is a form of undertaking on a return to defendant on claim and delivery of personal property:

In the justice's court of .... township, in the county of ...., state of ....

....,
plaintiff,
against
....,
defendant.

Whereas, ..., constable of .... township, in the county of ...., under and by virtue of an order and requirement duly made and issued in the above entitled action and to him directed, did, on the .... day of ...., A.D. 18.., take from the possession of the defendant in said action the following personal property to wit: [description of the property]. And whereas, the said defendant being desirous that the said property be returned to him by the said constable, has not excepted to the sureties of the said plaintiff, but has required the return of said property upon giving this undertaking.

Now, therefore, we, the undersigned, ... and ...., as sureties, in consideration of the premises, and of the said return of the said property by the said constable to the said defendant, do hereby undertake, promise and acknowledge, to the effect that we are jointly and severally bound unto the said plaintiff in the sum of .... dollars (being double the value of said property, as stated in the affidavit of the said plaintiff), for the delivery thereof to the said plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the said defendant.

In witness whereof, we have hereunto set our hands and seals, this .... day of ...., A.D. 18..

.... [L.S.]
.... [L.S.]

State of .....,
county of ..... } ss.

.... and ...., the sureties in the within undertaking, being duly sworn, each for himself, says: That he is a resident and householder within the said .... county, and is worth double the amount stated in the said undertaking over and above all his debts and liabilities, exclusive of property exempt from execution.

....
....

Subscribed and sworn to before me, this .... day of ...., A.D. 18..

....,
Justice of the peace.

Justification of Defendant's Sureties.

SEC. 38. The defendant's sureties, upon reasonable no-

tice to the plaintiff, shall justify before the justice; and upon such justification, the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify or until the justification is completed or expressly waived, and may retain the property until that time, but if they, or others in their place, fail to justify at the time appointed, he shall deliver the property to plaintiff. *Pr. Act*, 562; *Gen. Laws*, 5493.

Form of Certificate of Justification of Sureties and approval of foregoing Affidavit, to be indorsed Thereon.

SEC. 39. The following is a form of certificate of justification of sureties and approval of foregoing affidavit, to be indorsed thereon:

On the ...., day of ...., A.D. 18.., the sureties within-named appeared personally before me, and were examined on oath on the part of the plaintiff, touching their sufficiency, in such manner as I, in my discretion, thought proper, which examination was reduced to writing, and subscribed by the sureties, and is hereto annexed; and I did then and there find the said sureties sufficient, wherefore I do allow this present undertaking.

....,
Justice of the peace.

How Officer to Take and Keep Property.

SEC. 40. If the property or any part thereof be concealed in a building or inclosure, the officer shall publicly demand its delivery; and if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession. When the officer shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same. *Pr. Act*, 563, 564; *Gen. Laws*, 5494, 5495.

Claims by Third Persons.

SEC. 41. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the officer, the officer shall not be bound to

keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer unless so made. *Pr. Act*, 565; *Gen. Laws*, 5496.

Officer's Return.

SEC. 42. The officer shall return the order and affidavit, with his proceedings thereon, to the justice within five days after taking the property mentioned therein. *Gen. Laws*, 5497.

CHAPTER XXXVIII.

CONTEMPTS.

SECTION 1. By the common law, every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency and silence, without which no court could vindicate or support the laws intrusted to its administration. The power thus vested in a court is necessarily of an arbitrary nature, and should be used with great prudence and caution. A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct. 1 *Cal.* 153.

SEC. 2. A justice may punish as for contempt, persons guilty of the following acts, and no other:

1st. Disorderly, contemptuous or insolent, behavior towards the justice while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

2d. A breach of the peace, boisterous conduct or violent disturbance, in the presence of the justice or in the immediate vicinity of the court held by him, tending to interrupt the due course of trial or other judicial proceeding.

3d. Disobedience or resistance to the execution of a lawful order or process, made or issued by him.

4th. Disobedience to a subpena duly served, or refusing to be sworn or answer as a witness.

5th. Rescuing any person or property in the custody of any officer by virtue of an order or process of the court held by him.

SEC. 3. A justice may issue a warrant for abusive words in relation to his office and threats of personal injury to himself, and require the party to give security for his good behavior. 2 *Hill* (S. C.) 410.

SEC. 4. The disobedience of an order of court is only a contempt when it is a lawful order. 7 *Cal.* 179.

SEC. 5. It will not be contended that parties may not be punished for resistance or disobedience to erroneous orders, or that the officer executing final process, issued on an erroneous judgment, would make himself liable as a trespasser. In the examination of this question we should be careful to distinguish between the erroneous exercise of a power conferred by law, and the usurpation of power. If the district court has jurisdiction, under any circumstances, to make a certain order, the issuance of such order in an improper case would be error certainly, which an appellate court would correct, but would not be an usurpation of power or an excess of jurisdiction. 5 *Cal.* 495.

SEC. 6. A commitment for contempt, for refusing to obey an order of court commanding the imprisonment of the party in contempt until he shall comply with the order, should set forth that it is in the power of the party to comply. 6 *Cal.* 320.

SEC. 7. Courts are the exclusive judges of their own contempts; still, by our statute, a party cannot be imprisoned for neglecting or refusing to perform an act where it appears that it is not in his power to perform the same. 6 *Cal.* 318.

SEC. 8. When a contempt is committed in the immediate

view and presence of the justice, it may be punished summarily, for which an order shall be made reciting the facts, as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense or excuse shall be given. The justice may thereupon discharge him, or may convict him of the offense. A justice may punish for contempts, by fine or imprisonment or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day. The conviction, specifying particularly the offense and the judgment thereon, shall be entered by the justice in his docket. *Gen. Laws*, 617, 618.

SEC. 9. The judgments and orders of courts or judges, on the subject of contempts are, by our statutes, declared to be final and conclusive. 5 *Cal.* 495.

SEC. 10. A justice who has fined a person for contempt of court, has power to imprison him until payment of the fine and costs. 19 *Ill.* 613.

SEC. 11. The power of a justice to punish persons guilty of contempt existed at common law. 8 *Johns.* 44.

SEC. 12. Where the contempt is committed in the presence of the court, and the offender has not left court, he may be at once called upon to answer for it. If, however, he has left the court, the warrant provided by the statute will be necessary to bring him up to answer. This may be in the following form:

Warrant of Arrest.

..... county, town of..... } ss.

The people of the state of ..... to any constable of said county, greeting:

We command you to apprehend .... and bring him before ....., esq., one of the justices of the peace of the said county, at his dwelling-house in said town, to show cause why he, the said ...., should not be convicted of a criminal contempt, alleged to have been committed on the .... day of ...., before the said justice, while engaged as a justice of the peace, in .... judicial proceedings.

Witness our said justice, at the town aforesaid, the .... day of ...., 18..

....,

Justice of the peace

CHAPTER XXXIX.

COSTS.

SECTION 1. Costs are an incident to the judgment, to be taxed by the clerk or court, and cannot be given by the jury by way of damages. 6 *Cal.* 286.

SEC. 2. Costs, by way of indemnity, ought not to be taxed in case of a nonsuit. The statute looks to an actual determination of the cause upon its merits. So where an action has been commenced against several defendants, and there has been a judgment in their favor, they are not all entitled to recover separate costs to the amounts allowed by the act, but can only recover jointly, as though there had been but one defendant. 5 *Cal.* 61.

SEC. 3. The affidavit accompanying the bill of costs may be made by some person other than the party, by his attorney or some one else, in his behalf who had knowledge of the facts. 3 *Cal.* 119.

SEC. 4. Where the original bill of costs is filed within the time prescribed by the statute, an amendment allowed after the time relates back to the time of filing the original, of which it forms merely a part. 3 *Cal.* 118.

SEC. 5. In an action commenced before a justice on the sixth of September, the jury disagreed twice. During a third trial, the justice's term expired on the thirtieth of November, and it was agreed that the cause should go on, and that the parties would abide the result; but the jury disagreed, and nothing further was done: *Held*, that no action lay for the defendant's taxable costs. 2 *Wms.* (28 Vt). 486.

SEC. 6. An attorney has no lien upon a judgment recovered by him in favor of his client, for a *quantum meruit* compensation for his services. Such lien extends only to costs given by statute. In this state we have no statute giving costs to attorneys, and they must consequently recover for their services in the ordinary mode. 1 *Cal.* 332.

SEC. 7. The costs upon an appeal are properly the costs in this court, and the costs of making up the appeal in the court below, including the cost of making out the transcript. 11 *Cal.* 341.

CHAPTER XL.

DAMAGES.

SECTION 1. The amount of damages is simply a question of fact within the province of the jury. 3 *Cal.* 58, 59.

SEC. 2. In actions for damages, the rule is, that the proof of damage may extend up to the time of the verdict, as to all facts which flow as a natural result from the injury for which suit is brought. 17 *Cal.* 566.

SEC. 3. Contemplated and contingent profits cannot be allowed as damages. Thus, where the calculation is based upon the fact that the product of twenty acres of land was worth nine thousand dollars, from which arbitrators inferred the product of two hundred acres would have been worth ninety thousand dollars—the damages thus estimated are too remote and speculative and involve too many contingencies. 2 *Cal.* 78.

SEC. 4. In case of negligence simply, the rule governing the measure of damages is to allow the actual damages. The allowance of smart money in such cases is improper. 4 *Cal.* 299.

SEC. 5. The rule is, when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of the conversion; where the value is fluctuating the plaintiff may recover the highest value at the time of the conversion, or at any time afterwards. 9 *Cal.* 563.

SEC. 6. The amount of damages is for the jury, who may give the value at the time of the conversion, or any subsequent time in their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. The jury are not at all limited in giving their verdict by what was the price of the article on the day of the conversion. 9 *Cal.* 563.

SEC. 7. In actions for personal torts, the law does not fix any precise rule of damages, but leaves their assessment to the unbiassed judgment of the jury. In such cases, the court will not disturb the verdict of a jury on the ground that the damages are excessive, unless the amount of dam-

age is so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool, dispassionate consideration of the jury. 24 *Cal.* 513.

SEC. 8. In an action for damages for cutting down growing trees, the measure of damages is not the actual value of the trees for firewood, but the damage done to the land by reason of destroying them. This damage should be estimated by all the circumstances, and the purposes for which the trees were used or designed, and not according to the speculative or fancied ideas that the jury or plaintiff might have drawn of their worth. 6 *Cal.* 162, 163.

SEC. 9. The loss of time, value of services and wages, of employés, caused by the failure of a party to perform this contract, are damages by no means remote, but on the contrary strictly proximate and immediate, and ought to be considered and allowed. 3 *Cal.* 259, 260.

SEC. 10. An action to recover damages for collision cannot be sustained where the injury of which the plaintiff complains has resulted from the negligence of both parties; so held, where a brig lying in the harbor of San Francisco, in the usual track of bay and river steamers, without having any light hung out, was run into and damaged by a river steamer when entering the harbor on her usual course and with diminished speed, it appearing that there was no intentional wrong on the part of the defendants; and held further, that if ordinary prudence required the brig to show a light, the fact that it was a common practice in the harbor to neglect to do so, was no excuse, it appearing that the brig lay in a more dangerous situation than most of the shipping in the harbor. 1 *Cal.* 365, 366.

SEC. 11. In a suit for damages for the failure of the defendants to deliver goods according to contract, the true rule of damages is the difference between the price agreed on between the parties and the market value of the goods at the time of the breach of the contract. Testimony should not be admitted to prove the speculative profits of the plaintiffs. Where the contract was for the cargo, or all the goods of a given description in a given vessel, the fact that there were no other like goods in the market did not warrant the admission of evidence showing what

they were worth in broken packages, much less testimony to prove plaintiff's amount of sales and profits. The value of a cargo of similar goods might have been ascertained by the testimony of competent merchants, and the difference between the value so estimated and the contract price would have been the true measure of damages. 3 *Cal.* 375, 376.

SEC. 12. Where the property, the subject of a suit, is delivered and accepted pending the suit—that is, before verdict—the damages should be merely nominal; but if the goods are only delivered after verdict, it must be assumed that the delivery was in pursuance of the verdict which had already determined the rights of the parties, and the difference in value of the property between the time of detention and of delivery is not the true measure of damages. The most liberal rule would allow the highest value of the goods at any time between the conversion and the judgment and interest thereupon; but where the plaintiff accepts the goods, he has elected to take them in lieu of their value, and the only damages he can recover would be the interest upon their highest value, except in cases where some special damage is specifically averred in the complaint. 5 *Cal.* 328, 329.

SEC. 13. The rule of damages against a purchaser for not receiving goods according to contract, is the difference between the contract price and the market value at the time of the breach of the contract. 4 *Cal.* 411.

SEC. 14. If a man sells his property or contracts with another, on good consideration, that the latter shall pay his debt for a breach of the obligation, the measure of damages would be the amount. The law supposes in such a case that the payment of the debt is equivalent in value to the debtor to so much money in hand. 13 *Cal.* 524.

SEC. 15. In an action against a common carrier for nonperformance of his contract to carry a passenger, remote and contingent damages cannot be recovered. So *held* in a case where the plaintiff, through the violation of the agreement of the defendants, was detained at New Orleans and at Panama, on his way to California, an unreasonable length of time, and the court charged the jury that the

measure of damages would be the wages at the then rates in San Francisco during the period of such detention. 1 *Cal.* 353.

SEC. 16. In an action against a common carrier, the rule of damages is the value of the goods at the port of delivery, and not the invoice price or the value at the port of shipment. 1 *Cal.* 110.

SEC. 17. In an action against a common carrier for the non-delivery of goods, the value thereof at the port of discharge is the proper measure of damages. 1 *Cal.* 214.

SEC. 18. This is an action to abate a nuisance and for damages. The nuisance was caused by the digging of a ditch upon the land of the plaintiff. The court ordered the nuisance to be abated, and awarded as damages a sum sufficient to pay the expenses of filling up the ditch and restoring the land to its original condition. In assessing the damages the court proceeded upon an incorrect basis, and, of course, arrived at an erroneous result. The plaintiff could not recover beyond the injury sustained, and it was improper to award compensation for an expense which might never be incurred. It is possible the cost of filling up the ditch may far exceed any injury resulting from it in its present condition, and in that case it is not probable that the amount recovered would ever be used for that purpose. There are, undoubtedly, cases in which it is proper to allow prospective damages; but it is certain that the present case does not belong to that class. "If the case be tort," says Sedgwick, "and the wrong done before suit brought, the plaintiff is not limited solely to the consequential damage which has actually occurred up to the trial of the cause, but he may go on to claim relief for the prospective damage which can then be estimated as reasonably certain to occur." *Sedg. on Dam.* 109. It is evident that relief of this character cannot be obtained unless it appear that the party will be subjected to the particular loss or injury for which he demands compensation. 17 *Cal.* 617.

SEC. 19. In an action against a sheriff for damages for the wrongful seizure of the goods, the true measure of damages is the value of the goods at the time of the taking. 23 *Cal.* 349.

CHAPTER XLI.

DEPUTATION.

SECTION 1. The summons, execution and every other paper, made or issued by a justice, except a subpena, shall be filed without a blank left to be filled by another, otherwise it shall be void. *Gen. Laws*, 5542.

SEC. 2. Though process issued by a justice may be altered by his direction, yet a general authority by him to a constable to alter the dates of executions instead of renewing them or to fill up or alter process, is void. 10 *Johns.* 405.

SEC. 3. A justice may delegate his power to issue an execution on a judgment rendered, and the power need not be in writing. 3 *Ala.* 481.

SEC. 4. In case of the sickness, other disability or necessary absence, of a justice on a return of a summons or at the time appointed for a trial, another justice of the same township or city may, at his request, attend in his behalf, and shall thereupon become vested with the power, for the time being, of the justice before whom the summons was returnable. In that case the proper entry of the proceedings before the attending justice, subscribed by him, shall be made in the docket of the justice before whom the summons was returnable. If the case be adjourned, the justice before whom the summons was returnable may resume jurisdiction.

SEC. 5. The justice, may at the request of a party, and on being satisfied that it is expedient, specially depute any discreet person of suitable age and not interested in the action, to serve a summons or execution, with or without an order to arrest the defendant, or with or without a writ of attachment. The said justice shall be liable on his official bond for all official acts of the person so deputed. Such deputation shall be in writing on the process. *Gen. Laws*, 5544.

SEC. 6. The person so deputed shall have the authority of a constable in relation to the service, execution and

return, of such process, and shall be subject to the same obligations. *Gen. Laws,* 5545.

[For form of deputation, affidavit and order, see SUMMONS, Chap. LXXIX.]

SEC. 7. At common law, a justice may authorize any person he pleases to be his officer. *Breese,* 144.

SEC. 8. A justice cannot delegate any part of his official power or authority to another. 9 *Barb. Sup. Ct.* 611.

SEC. 9. Yet it seems that he may depute another to do a specific act, without vesting in him any discretion. 9 *Barb. Sup. Ct.* 611.

SEC. 10. An appointment by a justice of the peace to serve process is a judicial act and cannot be done by proxy. 6 *Vt.* 509.

SEC. 11. A deputation, by a justice to a person to execute a legal process, must express the full name of the person deputized, or it will be void for uncertainty, and will confer no authority on any person. 11 *Hamph.* 71.

SEC. 12. A justice of the peace has no authority to direct his warrant to a private person, unless when it shall be necessary, and that necessity is expressed in the warrant to be so directed. 1 *Mass.* 488, 493.

SEC. 13. The plaintiff, who was improperly sued in trespass, on account of a levy by a deputy constable, and who paid the judgment rendered against him, cannot sue the constable on his bond for improperly appointing the deputy. The constable, like any other ministerial officer, has the right to appoint as many deputies as he pleases. The deputy is not guilty of any trespass in levying by virtue of legal process in his hands. The plaintiff paid the judgment against him for the trespass in his own wrong. 4 *Cal.* 188.

CHAPTER XLII.

DEPOSITIONS.

	SECS.		SECS.
WHO MAY TAKE	7- 9	OBJECTIONS TO	23-29
NOTICE TO TAKE	10-18	ADMISSIBILITY OF	30-33
CERTIFICATE	19-22	WHEN MAY BE USED	34-35

Who may Take.

SECTION 1. The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

1st. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2d. When the witness resides out of the county in which his testimony is to be used.

3d. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4th. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

Justices of the peace may issue commissions to take the depositions of witnesses out of the state, and settle interrogatories to be annexed thereto and direct the manner in which the commissions shall be returned. *Pr. Act*, 428, 620; *Gen. Laws*, 5362, 5551.

SEC. 2. *Of a Party to an Action.*—The testimony of a party to an action may be taken by deposition, if he resides out of the county in which his testimony is to be used, although he resides within less than thirty miles of the place of trial. *Skidmore* vs. *Taylor*, 29 Cal. 619.

SEC. 3. All the requisitions of the statute in relation to the taking of depositions must be strictly complied with, and this must appear upon the deposition to entitle it to admission. *Dye* vs. *Bailey*, 2 Cal. 383.

SEC. 4. The mode of taking depositions, pointed out by

statute is in derogation of the common law; and the officers must follow the statute strictly. 2 *Cal.* 383.

SEC. 5. *Discretion of Court.*—The decision of a motion to suppress the reading of a deposition rests in the sound discretion of the court, who must decide upon the sufficiency, or otherwise, of the grounds upon which such motion is made. *Mills* vs. *Dunlap*, 3 Cal. 94.

SEC. 6. *Interpretation of.*—Where a deposition is taken, *ex parte*, though after notice, and the witness is, therefore, not subjected to a cross examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it. *Spring* vs. *Hill & Carr*, 6 Cal. 17.

Who May Take.

SEC. 7. Either party may have the deposition taken of a witness in this state before any judge or clerk, or any justice of the peace or notary public in this state, on serving on the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is one mentioned in the last section. At any time during the forty days immediately after the service of summons by publication has been completed, and at any time thereafter, when the defendant has not appeared, the notice required by this section may be served on the clerk of the court where the action is pending. Such notice shall be at least five days, and in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless for a cause shown a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice. Either party may attend such examination and put such questions, direct and cross, as may be proper. The deposition, when completed, shall be carefully read to the witness and corrected by him in any particular, if desired; it shall then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelop or wrapper, sealed and directed to the clerk of the court in which the action is pending or such person as the parties in writing may agree upon, and either delivered by

the judge or officer to the clerk or such person, or transmitted through the mail or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken by the reason of the absence or intended absence from the county of the witness or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial that the witness continues absent or infirm, to the best of the deponent's knowledge or belief. The deposition thus taken may also be read in case of the death of the witness. *Pr. Act*, 430.

SEC. 8. If a commission to take the deposition of a witness out of this state is issued, on the application of one party without the consent of the other, to a person who is not a judge or justice of the peace or a commissioner appointed by the governor of this state, and the party who does not consent, after the appointment, files cross interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the commissioner was improperly appointed. *Crowther* vs. *Rowlanson*, 27 Cal. 376.

SEC. 9. It is no ground for the exclusion of a deposition that it was noticed to be taken before the county judge, but was taken before the county clerk. *Williams* vs. *Chadbourne*, 6 Cal. 559.

Notice to take Depositions.

SEC. 10. A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice. *Mills* vs. *Dunlap*, 3 Cal. 94.

SEC. 11. The decision of such motion rests in the sound discretion of the court, who must decide upon the sufficiency or otherwise of the ground upon which such motion is made. 3 *Cal.* 94.

SEC. 12. *What to Contain.*—It being objected to by plaintiff to a deposition: 1st. That the copy of the order of the judge, fixing the time for taking it, did not mention the

notice to be given the adverse party. 2d. That no correct copy of said order was served. 3d. That no sufficient notice to take the deposition was ever given. The objection was overruled, because the original of the judge, made on affidavit, fixed the time of notice at three days, and because plaintiff's counsel acknowledged service, in writing, of a copy thereof, March 8th, 1859, more than three days before the taking of the deposition: *Held*, that there was no error, that the objection assigned was matter for the court, and its discretion was properly exercised. That reasonable notice should be given of the time and place of taking testimony; but what is reasonable notice depends on the particular circumstances. *Attwood* vs. *Fricot*, 17 Cal. 37.

SEC. 13. Notice of time and place having been given, it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule. *Williams* vs. *Chadbourne*, 6 Cal. 559.

SEC. 14. Proof of notice to take a deposition, where the written notice was defective, was held good when made by parol, and conforms substantially to the statute. *Mills* vs. *Dunlap*, 3 Cal. 94.

SEC. 15. *Order of Court to take.*—An order to take testimony by deposition should specify the notice to be given to the adverse party. A deposition taken upon an order without such specification, where the opposite party has not had reasonable notice, ought not to be read in evidence. *Ellis* vs. *Jaszynsky*, 5 Cal. 444.

SEC. 16. *Exceptions to Deposition.*—Where a rule of the district court requires three days' written notice of exceptions to depositions, if they are returned and filed with the clerk that length of time before trial, and such notice is not given on a first trial, the depositions may be admitted on a second trial, though it took place the day after the first trial. The party was in default in not giving the notice before the first trial. *Myers* vs. *Casey*, 14 Cal. 542.

SEC. 17. Where such rule of a district court requires the notice as above, unless the exceptions appear on the face of the depositions, the meaning is, that the objection—not the objectional matter—must appear on the face of the deposition. 14 *Cal.* 542.

SEC. 18. An appearance at the time and place, and cross-examining the witness, waives whatever objection may be had because the notice is too short. *Jones* vs. *Love*, 9 Cal. 68.

Certificate to.

SEC. 19. *What it must State.*—A certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute. *Williams* vs. *Chadbourne*, 6 Cal. 559.

SEC. 20. It is not essential to the certificate of a notary to a deposition taken before him, that it state that the deposition was read over to the witness before signing; but if the certificate state that the deposition was correct by the notary, under the direction of the witness, it is sufficient compliance with the statute, because showing, by necessary implication, that the deposition was either read to or examined by the witness. *Higgins* vs. *Wortell*, 18 Cal. 330.

SEC. 21. *Date of Certificate.*—If, at the end of a deposition taken by a commissioner out of the state, there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of a compliance with the four hundred and thirtieth section of the practice act should be dated. *Elgin* vs. *Hill*, 27 Cal. 372.

SEC. 22. *Waived by Stipulation.*—If the parties stipulate that a commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day, the same may be taken by the commissioner; it is not necessary that the commissioner state in his certificate the day the same was taken. 27 *Cal.* 372.

Objections to.

SEC. 23. *When Made.*—There is nothing in the statute that requires that exceptions to depositions shall be filed before the time of trial. The objection can be made at any time before the depositions are read in evidence. *Dye* vs. *Bailey*, 2 Cal. 383.

SEC. 24. A motion to suppress the reading of a deposi-

tion before the case in which it was taken is put upon trial, is premature. The proper time to object to such deposition is when it is offered in evidence on the trial. *Mills* vs. *Dunlap*, 3 Cal. 94.

SEC. 25. *When Waived.*—When the deposition of a witness is taken, objections to his competency must be taken at the time and not reserved till the trial, or they will be deemed waived. *Jones* vs. *Love*, 9 Cal. 68.

SEC. 26. In this case the deposition of Fairbanks was offered in evidence by plaintiff, and obtained this on the fourth interrogatory: "Have you any conveyance for said premises from any one? If yes, from whom and where is said title-deed?" The answer to which was: "Hatch made a deed to me of said premises in the early part of 1854, and I have the deed now in my possession": *Held*, that the rejection of this answer when offered in evidence by plaintiff could not have been such a surprise upon him as on that ground to set aside the verdict against him; that the only benefit the testimony could have been to plaintiff was the proof of the contents of the deed, and that counsel could not have expected to read one part of this answer to prove the contents of the lost deed when the other part proved the deed to be then in the possession of the witness: *Held*, further, that the rejection of this answer on defendant's objection was not waived because not raised when the deposition was taken. *Lawrence* vs. *Fulton*, 19 Cal. 683.

SEC. 27. Depositions are subject to all legal exceptions at the trial, save only the objection to the form of an interrogatory where the parties attend the examination. 19 *Cal.* 683.

SEC. 28. Where the parties stipulated that a deposition which had been taken in another action should be used on the trial, "with the same force and effect, and subject to the same exceptions, as if taken in this case": *Held*, that the stipulation was a waiver of any objection to the competency of the witness. *Brooks* vs. *Crosby*, 22 Cal. 42.

SEC. 29. A party who appears at the taking of a deposition and examines the witness without objecting to his competency, cannot afterwards interpose that objection. 22 *Cal.* 42.

Admissibility of.

SEC. 30. A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial. *Turner* vs. *McIlhaney*, 8 Cal. 575.

SEC. 31. If part of the deposition be liable to the exception of hearsay, this only goes to the rejection of that part, and the objection should be taken at the hearing. *Myers* vs. *Casey*, 14 Cal. 542.

SEC. 32. The deposition of a surveyor, who ran the boundary lines of a grant, taken in one action, is admissible in another action between different parties as hearsay evidence, upon the location of such lines, after his death. Hence, the deposition of Vioget, as to the position of the southern boundary of the Sutter grant, offered in connection with the map drawn by him, is admissible as hearsay evidence, though taken in another action between different parties. *Morton* vs. *Folger*, 15 Cal. 275.

SEC. 33. A whole deposition cannot be excluded on the ground that certain questions asked on the examination were improper. The objection to the deposition on this ground must be confined to the particular questions, otherwise any error in permitting the questions will be waived. *Higgins* vs. *Wortell*, 18 Cal. 330.

When may be Used.

SEC. 34. When a deposition has been once taken, it may be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it. The testimony of a witness out of the state may be taken by deposition in an action, at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, at any time after a question of fact has arisen therein. *Pr. Act*, 431, 432; *Gen. Laws*, 5366, 5467. The party obtaining a postponement of a trial in any court of record, shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court

may indicate, which shall accordingly be done, and the testimony so taken may be read on the trial with the same effect and subject to the same objections, as if the witnesses were produced. *Pr. Act*, 664; *Pub. Laws*, 1854.

SEC. 35. The reading of evidence taken by deposition, although done after the jury have retired, is as much a part of the trial as any other. *The People* vs. *Kohler*, 5 Cal. 72.

SEC. 36. The object of this section is to enable either party to read a deposition admissible in itself, once taken, in any stage of the action or proceeding—not to render it admissible simply because it was taken. *Turner* vs. *McIlhaney*, 8 Cal. 575.

CHAPTER XLIII.

DISMISSAL AND DISCONTINUANCE.

	SECS.		SECS.
WHAT IS A DISMISSAL.....	1	WHEN SUIT MAY BE DISCONTINUED.....	8– 9
WHEN ACTION MAY BE DISMISSED	2– 5	IMPROPER DISCONTINUANCE AS TO ONE DEFENDANT.....	10
WHAT OPERATES A DISCONTINUANCE.....	6– 7		

What is a Dismissal.

SECTION 1. A dismissal of an action is a final decision of the action, and it is a final decision *of the action* as against all claim made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action. In the case of *Dowling* vs. *Polack* (18 Cal. 625), the court say: "In effect, a dismissal is a final judgment in favor of the defendant; and, although it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the proceedings in the particular action the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits." 21 *Cal.* 164.

When an Action may be Dismissed.

SEC. 2. Judgment that the action be dismissed without

prejudice to a new action, may be entered with costs in the following cases:

1st. When the plaintiff voluntarily dismisses the action before it is finally submitted.

2d. When he fails to appear at the time specified in the summons or upon adjournment or within one hour thereafter.

3d. When it is objected at the trial and appears by the evidence, that the action is brought in the wrong county or township or city; but if the objection be taken and overruled, it shall be cause only of reversal on appeal, and shall not otherwise invalidate the judgment; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal. *Gen. Laws*, 5522.

SEC. 3. After an action has been tried and submitted, the plaintiff has no right to dismiss it, nor has the court then any authority to enter an order of dismissal without the consent of the defendant. 22 *Cal.* 100.

SEC. 4. Though a motion to dismiss the complaint in an action before a justice be made on the return day, yet it is error to allow it on the adjourned day when the parties are ready for trial on the issues joined. 17 *Barb.* (N. Y.) 141.

SEC. 5. He cannot dismiss a suit of which he has jurisdiction, after a trial upon the merits, but must give judgment for one or the other of the parties. 1 *Green*, 165.

What Operates a Discontinuance.

SEC. 6. A discontinuance cannot be made by an order of the court of an action over which it has no control; it is the result of some act done or omitted by the plaintiff which withdraws his suit from the power and jurisdiction of the court. 6 *Humph.* 419.

SEC. 7. If the justice is not present at the time when the writ is made returnable, and the case is not continued as provided by statute in such cases, it operates a discontinuance. 6 *Shep.* 23. So also his absence from a place to which a cause has been adjourned by him, for the whole half day within which the cause was set down for trial, is a discontinuance of the action. 9 *Vt.* 118. So also his ab-

sence at the time and place to which he has continued a case, operates a discontinuance. 5 *Shep.* 413. So also the expiration of his commission is a discontinuance of a cause pending before him. 2 *Penn.* 906.

When Suit may be Discontinued.

SEC. 8. A plaintiff may discontinue his suit at any time, as well after an appeal from the judgment as before. 9 *Mo.* 251.

SEC. 9. A justice, after deciding to continue a case on defendant's motion, may, on plaintiff's motion, at the same sitting enter a discontinuance on the record. 3 *Wms.* (28 Vt.) 557.

Improper Discontinuance as to one Defendant.

SEC. 10. When a suit is improperly discontinued as to one of the defendants, this will not avail another, who afterwards appears and defends the suit. 10 *Ala.* 213.

CHAPTER XLIV.

JUSTICE'S DOCKET.

SECTION 1. Every justice shall keep a book, denominated a docket, in which he shall enter:

1st. The title of every action or proceeding.

2d. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand.

3d. The date of the summons and the time of its return, and if an order to arrest the defendant be made or a writ of attachment be issued, a statement of these facts.

4th. The time when the parties, or either of them, appear, or their non-appearance if default be made; a minute of the pleadings and motions, if in writing, referring to them—if not in writing a concise statement of the material parts of the pleading and of all motions made during the trial by either party, and his decisions thereon.

5th. Every adjournment, stating on whose application, whether on oath, evidence or consent, and to what time.

6th. The demand for a trial by jury, when the same is made and by whom made, the order for the jury and the time appointed for the trial and return of the jury.

7th. The names of the jury, who appear and are sworn, the names of all witnesses sworn and at whose request.

8th. The verdict of the jury and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.

9th. The judgment of the court, specifying the costs included, and the time when rendered.

10th. The issuing of the execution, when issued, and to whom, the renewals thereof, if any, and when made, and a statement of any money paid to the justice, and when and by whom.

11th. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed. *Pr. Act*, 604, Sec. 157.

The several particulars above specified shall be entered under the title of the action to which they relate, and at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice or his successor in office, shall be primary evidence to prove the facts so stated therein. *Pr. Act*, 605, Sec. 158. A justice shall keep an alphabetical index to his docket, in which shall be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs shall be entered in the index, in the alphabetical order of the first letter of the family names.. *Pr. Act*, 606, Sec. 159.

SEC. 2. The following form will convey some idea of the manner in which a justice's docket should be kept:

....
against
....

[Date.] Summons issued returnable .... days after the service thereof.

..... Summons returned personally served by ...., on the .... inst. Fees ....

..... Parties appear. Plff. by .... and deft. by .... Plff. declares against the deft. for goods, wares and merchandise, sold by plff. to deft. at his request, at the city of ...., in ....; claims .... dollars damages. Deft. answers, denying complaint, and gives notice of set-off for goods, etc., sold to plff., money lent, paid out, had and received; claims a balance of .... dollars. On motion and oath of deft. cause adjourned to .... inst., at ....

o'clock, at .... Issued venire at plff's request, returnable at the time and place last mentioned.

..... Parties appear and proceed to trial of the cause. The following jurors returned summoned upon the venire, by ...., constable [insert the names of the jurors] of whom all appeared except ..... The following were drawn and sworn as jurors to try the cause [insert names of jurors] .... and .... were sworn as witnesses for the plff., ... as a witness for deft. After hearing the testimony, argument of counsel and the instructions of the court, the jury retired under the charge of ...., constable, duly sworn for that purpose, and found a verdict in favor of the plff. for .... dollars, which was received on the day last mentioned; whereupon I immediately rendered judgment for the plff. and against the deft. for:

Amount found..... $.. ..
Costs ....
$.. ..

[Date.] Execution issued to ....

..... Execution returned satisfied.

An entry of judgment by confession may be as follows:

....
against
....

[Date.] Parties appear and judgment entered against the defendant on a demand arising upon contract, on his confession in writing, accompanied by his affidavit, for:

Sum confessed..... $.. ..
Costs ....
$.. ..

SEC. 3. Where the directing mandates of the statute were nearly complied with, in relation to the docket books of the justice, but a caption to the column was wanting, it was *held*, that on the ground of public policy the proceedings should be sustained, and that the judgment was not void for uncertainty when attacked by third persons. 3 *Humph.* 151.

SEC. 4. A justice can amend his docket according to the facts after the rendition of his judgment. 1 *Breese*, 195.

SEC. 5. After a justice has made up his record and delivered a copy to a party, upon which a *certiorari* is brought, he cannot alter the record and send up a different transcript. 2 *South*, 683.

SEC. 6. A copy of a record of a justice need not bear a seal. 4 *Gray* (Mass.) 29.

SEC. 7. And is sufficiently attested where the justice of

the peace is described as such in the record, if attested by him as "justice," without adding "of the peace." 4 *Gray* (Mass.) 29.

SEC. 8. In a suit against a justice for nonfeasance, records made by him are admissible in evidence; and the records, when produced, are conclusive as to all the facts therein stated, and cannot be impeached collaterally. 12 *Vt.* 657.

SEC. 9. The validity of such record is a question to be decided by the court. 12 *Vt.* 657.

SEC. 10. A justice's record cannot be contradicted by parol, nor in any way be collaterally impeached. 12 *Vt.* 538.

SEC. 11. Under the proper entitling of a cause with the names of the parties, a justice entered on his docket an award of judgment in the following form: "It is therefore considered that the said P. do recover of the said D. the sum," etc. In debt on this judgment, it was *held*, that the docket entry did not show with sufficient certainty in whose favor and against whom the judgment was rendered, and that therefore a transcript thereof offered in evidence was inadmissible. 1 *Doug.* 502.

SEC. 12. *Held*, also, that parol evidence was inadmissible to prove that the letters "p." and "d." meant "plaintiff" and "defendant." 1 *Doug.* 502.

SEC. 13. A justice's docket of a judgment rendered by him, though it may in some cases be explained, cannot as a whole be contradicted by parol proof; and it has a verity superior to a rule entered in the minutes of the court of common pleas, but not recorded, reversing such judgment. 3 *Barb. Sup. Ct.* 594.

SEC. 14. The jurisdiction of a justice must appear from the record of the proceedings, and will not be presumed. 5 *Pike*, 27.

SEC. 15. Where justices exercise jurisdiction out of their own township, under a statute provision allowing them to do so in certain cases, their records need not show that the facts existed to authorize them to exercise the jurisdiction, but this may be shown *aliunde*. 6 *Mo.* 57.

SEC. 16. Where a justice renders judgment immediately

after verdict and notes it in his minutes of trial, it is no cause for reversal on *certiorari* that he did not enter the judgment upon his docket for two or three days afterwards. 6 *Hill*, 38.

SEC. 17. Where a justice made an entry of a civil action upon his memorandum book, and of the proceedings therein, as follows: "1842, December 3, *Daniel Darling* vs. *Horace Park*. Entered and defaulted, and judgment for plaintiff for damages, 9.69, cost 3.11–12.80," and issued execution accordingly; but neither the writ nor the evidence of the plaintiff's demand was then filed in the case or in the possession of the justice; it was *held*, that if these papers were before the justice when the execution was issued the proceedings were not irregular, and that upon being subsequently produced before him and verified, he would thereupon be authorized to make a record of the judgment at large. 4 *Cush.* 197.

SEC. 18. A suit was set down for trial for the fourth day of September, 1849, and continued, but to no day certain, on the application of the defendant. On December twenty-second following, the justice made a memorandum on the warrant: "Judgment thirty-seven dollars" and issued an execution; on the twenty-fourth, he entered a formal judgment, and dated it September 4th, 1849. The defendant was not notified to appear, and did not appear after the fourth of September: *Held*, that the memorandum—"judgment, thirty-seven dollars"—was a nullity, because of its uncertainty; and that the formal judgment was void for want of notice to the defendant. 11 *Hamp.* 220.

SEC. 19. In a suit on a justice's judgment, the docket must show the issuing of summons, and a return of personal service in the cause in which judgment was rendered. 19 *Wend.* 477.

SEC. 20. The docket entry of the return of summons was "returned on oath": *Held*, that the judgment entered was not void, but remained in full force until reversed. 18 *Penn. State* (16 Harris) 120.

SEC. 21. The time when the action was commenced and judgment recorded should be entered on the docket. 1 *Penn.* 379.

SEC. 22. If a justice appoint a special constable, but has omitted to make an entry thereof in his docket, he may make the entry at any time, without a rule of the court above to that effect. 7 *Ind.* 525.

SEC. 23. A justice must enter the names of all witnesses and jurors on his docket. 1 *Penn.* 207, 321.

SEC. 24. A justice need not record any evidence in a case before him except such as is objected to—that must appear of record, whether admitted or not. 2 *Stew.* 474; 1 *Stew.* 26; 2 *Port.* 86.

SEC. 25. It must appear on the record of the justice that the jury were sworn. 2 *Penn.* 742.

SEC. 26. It is no ground for reversing the judgment of a justice of the peace that his report does not state whether the plaintiff was present or called when the verdict was rendered by the jury. 3 *Hill*, 75.

SEC. 27. Section six hundred and seven of an act to amend an act entitled an act to regulate proceedings in civil cases in the courts of justice of this state, passed April twenty-ninth, eighteen hundred and fifty-one, is hereby amended so as to read as follows: It shall be the duty of every justice of the peace, upon the expiration of his term of office, to deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors or any other which may be in his custody, to be kept as public records. If the office of a justice become vacant, by his death or removal from the township or city or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice shall be deposited in the office of some other justice in the township, to be by him delivered to the successor of said justice; and while in his possession he may issue execution on a judgment there entered and unsatisfied (may make all orders in proceedings supplemental to execution, and may file notices and undertakings on appeal, and may take the justification of the sureties, and on the filing of the undertaking on appeal order stay of execution), in the same manner and with the same effect as the justice by whom the judgment was entered might have done. If there be no other justice in the township, then the docket and papers of such justice

shall be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice. *Stats.* 1870.

SEC. 28. Any justice with whom the docket of his predecessor is deposited shall have and exercise over all actions and proceedings entered in the docket of his predecessor, the same jurisdiction as if originally commenced before him. In case of the creation of a new county or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, shall, for the purposes of this section, be considered the successor of said former justice. *Pr. Act*, 608.

SEC. 29. The justice elected to fill a vacancy shall be deemed the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city from that time shall be deemed the successor. *Pr. Act*, 609.

SEC. 30. When two or more justices are equally entitled under the last section to be deemed the successors in office of the justice, the county judge shall, by a certificate, subscribed by him and filed in the office of the county clerk, designate which justice shall be the successor of a justice going out of office or whose office has become vacant. *Pr. Act*, 610.

SEC. 31. A justice with whom the docket of a former justice is legally deposited, may give certified copies from such docket, but the certificate must show that the justice making it has the legal custody of the docket. 4 *Blackf.* 417.

CHAPTER XLV.

ESTOPPEL.

General Principles.

SECTION 1. An estoppel may arise either from matter of *record*, from the deed of the party; or from matter *in pais*—that is, matter of fact. Thus, any confession or admission

made in pleading in a court of record, whether it be express or implied from pleading over without a traverse, will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary. This is an estoppel by matter of record. As an instance of an estoppel by deed may be mentioned the case of a bond reciting a certain fact; the party executing that bond will be precluded from afterwards denying, in any action brought upon that instrument, the fact so recited. As an instance of estoppel *in pais*, may be mentioned the case of accepting rent of another; he will be estopped from denying that such man was his tenant. This doctrine of law gives rise to a kind of pleading that is neither by way of traverse or denial, nor confession and avoidance, but is a pleading that waives any question of fact and relies merely on the estoppel, and after stating the previous act, allegation or denial, of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before said or did. This pleading is called a pleading by way of estoppel. Every estoppel ought to be reciprocal: that is, should bind both parties; and this is the reason that, regularly, a stranger shall neither take advantage of nor be bound by an estoppel.

SEC. 2. An estoppel is when a man is concluded by his own act or acceptance to say the truth. And when A conveys land to B by a valid conveyance, he is not allowed to reclaim the estate because he is estopped, but because he has no existing title to it. Estoppels being odious because they will not permit a man to speak the truth, the law will not base a conclusion upon that ground when it can find a sufficient ground that is consistent with the truth. 9 *Cal.* 350.

SEC. 3. The sense of estoppel is, that a man, for the sake of good faith and fair dealing, ought to be estopped from saying that to be false which by his means has become accredited for truth and by his representations has led others to act. Although it is generally true that estoppels bind only parties and privies, yet even parol admissions may be conclusive where they have had the effect of inducing another to alter his condition. 3 *Cal.* 306, 307.

SEC. 4. It is undoubtedly true that a party will in many instances be concluded by his declarations and conduct which have influenced the conduct of another to his injury. The party in such cases is said to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property, it must appear: 1st. That the party making the admission by his declarations or conduct was apprised of the true state of his own title. 2d. That he made the admission with the express intention to deceive or with such careless and culpable negligence as to amount to constructive fraud. 3d. That the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge. 4th. That he relied directly upon such admission and will be injured by allowing its truth to be disproved. 14 *Cal.* 367, 368.

SEC. 5. Estoppels are of two kinds—solemn and unsolemn admissions. The latter are those which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party and which cannot afterwards be denied without a breach of good faith. Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself or implied from the open and general conduct of the party; for in the latter case, the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. If the implied declaration may be so considered, there is no reason why an *express* declaration to a third party may not be considered as equally addressed to others who afterwards act upon it. If the express declaration be confided to the third party as a confidential communication, then it might admit of some doubt. But where the express declaration to the third party is not confidential but general, and this is afterwards acted upon by others, the party making the declarations should be estopped. The particular *intention* with which the declaration, express or implied, was made, is not mate-

rial, except perhaps, when the communication is confidential. It is the fact that the declaration has been acted upon by others that constitutes the liability to them. It makes *no difference* in the operation of the rule, whether the thing admitted be *true* or *false*—it being the fact that it has been acted upon that renders it conclusive. If it is a case of innocent mistake, still if it has been acted upon by another it is conclusive in his favor. Where the plaintiffs were induced to bring an ejectment suit by the false statement of the defendant, the latter was held to be estopped to set up an otherwise good defense to the action. 9 *Cal.* 205–207.

SEC. 6. It is a general presumption that a debtor is trusted upon the faith of his property, and his possession of property is *prima facie* proof of ownership. Where, therefore, one permits another to deal with his property as if it belonged to the latter, and by his declarations permits others to be misled, such declarations must be considered as addressed to every one in particular who may give credit upon the strength of them, and the party making them must be concluded. This is the same case as where a man holds out to the world that a certain woman is his wife; in a suit for her debts, he will not be allowed to deny the marriage. So if a party permits his name to be used as one of a copartnership, he is liable to a stranger who believed him to be a partner. In all such cases, the partner is estopped, on grounds of public policy and good faith, from repudiating his own representations. 3 *Cal.* 307.

SEC. 7. When a party pursues a certain line of conduct, by which he has induced others to act, he is estopped from afterwards avoiding the consequences of his conduct. Before a party can urge an estoppel against another, he must be misled by the conduct of the party, in a case where he is ignorant of facts known to the party against whom the estoppel is alleged. If he knows the facts himself, or has the means of knowing them within his own control, he has no right to throw the labor of communicating them upon others. 8 *Cal.* 115, 115.

SEC. 8. If A permits B to act in his own name and to hold himself out to C in a false character, and has enjoyed the supposed advantages of this conduct, A is estopped to deny the character assumed by B. 7 *Cal.* 285.

SEC. 9. The supreme court held, in the case of *Kidd* vs. *Laird*, that a general verdict does not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. Our further examination of the question in this case has not changed our opinion, but furnishes us many additional reasons in favor of its correctness. "In order to constitute an estoppel," says chief justice Shaw, in *Eastman* vs. *Cooper* (15 Pick. 276), "the same point must be put in issue upon the record and directly found by the jury. Wherever a point of fact has been so put in issue and found by a jury, then the record is regarded as conclusive of that fact whenever it is again drawn in question by the parties or their privies." In *Gilbert* vs. *Thompson* (9 Cush. 348), the law is declarged to be well settled "that a judgment in a former action is conclusive only when the same cause of action has been adjudicated between the same parties, or the same point has been put in issue upon the record, and directly found by the verdict of the jury." It was held in *Porter* vs. *Baker* (19 N. H. 166), that "a fact found by a verdict and judgment, to constitute an estoppel, must be *res judicata*, that which was necessarily and immediately found according to the pleadings, not that on which the verdict was merely based—a fact in issue as distinct from a fact in controversy." It is too well settled to be controverted that a verdict is never conclusive upon immaterial or collateral issues. 1 *Story*, 474; 18 *Wend.* 107; 7 *Pick.* 146; 15 *Cal.* 148, 161.

SEC. 10. Admissions which have been acted on by others are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself or implied from the open and general conduct of the party. For in the latter case the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. In such cases the party is estopped on grounds of public policy and good faith from repudiating his own representations. There is no such doctrine in the law of evidence as that a casual or other declaration or act, made or done by a party which another may happen to

hear of, which would authorize the latter, without seeking further information, to go on and act as if it were true and hold the author concluded by it. If this were so, the number of parol estoppels might be so enlarged as to make almost every act or admission an estoppel. It would be scarcely safe to say or do anything in reference to his rights or property lest he might be held to some estoppel in favor of parties who had no relations with him at the time of these acts or declarations. 11 *Cal.* 349.

SEC. 11. Where a party purchased real estate, at an execution sale, upon the faith of the representations of the judgment creditor that his judgment was the first on the property, when, in fact, there were prior incumbrances on it of more than its value, the purchaser should be relieved and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. It makes no difference whether the misrepresentations were made willfully or ignorantly or that the action against the purchaser was brought in the name of the sheriff. Although the maxim, *caveat emptor*, applies to sheriff's sales, it has never been carried to the extent that such a sale could not be impeached on the ground of fraud or misrepresentation. The maxim only applies thus far, that the purchaser is supposed to know what he is buying and does so at his risk; but this presumption may be overcome by actual evidence of fraud, or it may be shown that, in fact, the party did not know the condition of the thing purchased, and was induced to buy upon the faith of representations made by those who, by their peculiar relations to the subject, were supposed to be thoroughly acquainted with it. 8 *Cal.* 21, 26.

SEC. 12. Warehousemen who give their receipt for goods on storage are estopped from setting up a want of segregation of the goods receipted for from other goods, in an action against them, by the holder of the receipt, for a conversion of the goods by a seizure in an action against a vendor of the plaintiff; and this, although the warehousemen are the attaching creditors, and although the sheriff making the seizure is not liable, by reason of there being no segregation. 6 *Cal.* 541.

SEC. 13. A mortgage executed by the defendant operates an estoppel to a defense of want of consideration. According to well-established principles of public policy, for the security of good faith and fair dealing, a party is not allowed to controvert the declarations which he has made by deed or to deny the enforcement of rights which he has thus attempted to confer. 3 *Cal.* 266.

SEC. 14. The doctrine of estoppel *in pais* is applied to prevent a wrong-doer from asserting claims against his declarations or conduct, not to prevent an innocent party from enforcing his rights. It is the wrong-doer who is estopped, upon the principle that he shall not take advantage of his own wrong. A man may tell a lie and induce action by inducing the belief that it is the truth, but the liar cannot prevent the person to whom the lie was told from showing the truth. It would, indeed, be against common honesty and common sense to permit a party to allege that he had done wrong; that he had made false representations; had obtained money from an innocent party thereby and had used it; and being in consequence estopped from denying the truth of his representations, the innocent party is also precluded from questioning their truth. 16 *Cal.* 627.

SEC. 15. Only a technical estoppel is required to be specially pleaded, and a technical estoppel is by deed to the party pleading or to one under whom he claims or by matter of record. 3 *Cal.* 307. Estoppels *in pais* cannot be pleaded but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel, under the direction of the court. 3 *Cal.* 308.

CHAPTER XLVI.

ESTRAYS.

SECTION 1. The general estray law provides that every citizen householder, who shall find an estray horse, mare, mule, jack, jennet or any neat cattle, sheep or goats, or any number of such animals upon his farm or premises, who

shall desire to take up the same shall, at any time after the expiration of twenty days from the finding of the same, go before some justice of the peace in his township or, if there be no acting justice therein, then before some justice of a neighboring township, and make oath as follows:

1st. That he has made diligent inquiry throughout his neighborhood to ascertain the ownership of such estrays, and that he has also put up, ten days previously, a written notice in one or more of the most public places in his township [naming the place or places in his township] setting forth all the information in his possession concerning the said animals, embracing a description of the marks and brands thereof, and that he has examined the county records of marks and brands, and that he found none of the marks or brands of such animal or animals upon record and that he was about to post the same.

2d. He shall, also, at the same time, make oath that the marks and brands of said animal or animals have not been altered since they came to his farm or premises and that the owner or owners are unknown to him. *Gen. Laws*, 2607.

[The counties of San Diego, Santa Barbara, San Luis Obispo, San Bernardino, Los Angeles and Monterey, are not included in the foregoing section, nor does the provision in regard to sheep and goats apply to the counties of Trinity, Tuolumne and Sacramento. See *Gen. Laws*, 2628, as to the last three counties.]

SEC. 2. Form of notice to be posted at least ten days before going before a justice of the peace:

Estray Notice.

There is now on my premises, in .... township, county of ...., state of ..... [here state the number and class of animals, their color and brands or marks]. Said animal or animals were first discovered by me on my premises on the .... day of ...., 18... I have examined the county records of marks and brands and have found none of the marks or brands of said animals upon record, and I am about to post the same.

Dated the .... day of ....., A.D. 18 ...

....

SEC. 3. The following is a form of affidavit which the taker-up must make at the expiration of ten days from the time of posting the above notice and after the expiration of twenty days from the finding of the animals on his farm or premises:

State of .....,
county of ..... } ss.

Personally came .... before me, an acting justice of the peace in and for .... township, state and county aforesaid, who, being sworn, says that on or about the .... day of ...., A.D. 18.. [the date named in the notice], he found the following described animals on his premises or farm [here describe them as in the notice]; that he has made diligent inquiry throughout his neighborhood to ascertain the ownership of said estrays; that he did on the .... day of ...., A.D. 18.., put up a written notice at [here describe the place or places], in said township, in which he gave all the information in his possession concerning the said animals, embracing a description of the marks and brands thereof; that he has examined the county records of marks and brands and that he found none of the marks or brands of such animal or animals upon record, and that he is about to post the same, and that the marks and brands of said animals have not been altered since they came on his farm or premises, and the owner or owners of said animals are unknown to him.

....

Sworn and subscribed to before me, this .... day of .... A.D. 18..

....

SEC. 4. *Appraisers.* — When the affidavit is made the justice shall appoint two disinterested resident householders to appraise and describe such animal or animals. *Gen. Laws*, 2609.

SEC. 5. *Duty of Appraisers.*—If the appraisers are not already able to describe and appraise such estray, they shall as soon as practicable proceed to view the same, and make out a detailed description thereof, stating the marks, brands, supposed age, color, stature and value, of each animal, which description and valuation shall be signed by the appraisers, and be sworn to before the justice appointing them. *Gen. Laws*, 2610.

SEC. 6. *Record of Description.*—The justice shall immediately record in a book, kept by him for that purpose, a statement of the taking up, with a description as sworn to by the appraisers and their appraisement. *Gen. Laws*, 2611.

SEC. 7. *Copy of Entry from Entry-book.*—The justice shall within twenty days, if the estrays have not been before that time claimed and proven by the true owner, transmit a certified copy of the entry in his estray book to the county recorder of the county, which shall be by him immediately recorded in a book to be kept for that purpose. Such record and the entry in the justice's book shall be at

all times subject to examination, without charge or fee. *Gen. Laws*, 2612.

SEC. 8. *Estrays Reclaimed.*—If the owner of a mule, jack, jenny, horse or mare, that has been posted shall within six months or the owner of neat cattle shall within three months from the time of posting appear and claim the same, he shall satisfy the taker-up thereof, and establish his claim before some justice of the peace of the proper township by evidence satisfactory to the justice. This being done, the justice shall order the animal to be restored to him, and shall award to the taker-up his expenses and costs, which, together with his own costs, the claimant must pay. The taker-up shall not be entitled to any compensation if the animal while in his possession has been by him or by his authority worked, ridden or used, in any way. *Gen. Laws*, 2613.

SEC. 9. If not reclaimed in the time provided in the preceding section the owner shall forfeit his right to the animal, and the taker-up shall become the owner of the animal by paying into the county treasury one-half of the appraised value as fixed by the appraisers. *Gen. Laws*, 2614.

SEC. 10. *Not to be Removed from County.*—Such animal shall not be exchanged, sold or disposed of, in any manner, or be removed from the county until one-half of the appraised value shall have been paid into the treasury. *Gen. Laws*, 2615.

SEC. 11. *Dying or Escaping.*—If, during the time above-limited, the animal die or escape, the taker-up shall not be liable. *Gen. Laws*, 2616.

SEC. 12. *Proceedings when Money Paid.*—In all cases where money has been paid into the county treasury, pursuant to the tenth section of this act, the same shall be kept in a separate account by the treasurer, and safely held in trust for the space of six months after it is so paid in, to be paid over to the true owner of the estray, upon such owner within the said time producing to the treasurer the certificate of the proper justice, setting forth that said owner had made satisfactory proof of ownership within the six months, as aforesaid, by a like proceeding, as provided for in the

sixth section of this act—the treasurer retaining out of said money his own percentage. *Gen. Laws*, 2617.

SEC. 13. *Appropriation of Money.*—All moneys paid into the county treasury under the provisions of this act, if not legally withdrawn as above provided, shall become a part, and belong to the county school fund, and be drawn from the county treasury on the warrant of the county superintendent, and shall be exclusively appropriated to the county school fund, and for no other purpose. *Gen. Laws*, 2618.

SEC. 14. *Penalty.*—The owner of any estray animal which has been legally taken up, or for the taken up of which proceedings have been commenced under this act, knowing the same to have been posted, shall not be permitted to take, lead or drive, the same from the premises or possession of the person legally possessed thereof, until proven and the charges paid; and any person knowingly and willfully violating the provisions of this section shall be subject to all the penalties that he would be subject to under the statute law: *provided*, he had no claim to said animal. *Gen. Laws*, 2619.

SEC. 15. *Taker-up Guilty of Larceny.*—If any person shall take into use, or in any manner dispose of any lost or estray animal, which may be found upon his farm or premises, or exercise any control over any such animal, except in case said animal has broken into his lawful inclosure, without having first posted the same or having proceeded to post any such animal, shall use or in any manner dispose of the same contrary to and in violation of the provisions of this act, he shall be deemed guilty of larceny and punished accordingly. *Gen. Laws*, 2620.

SEC. 16. *Delinquency.*—If at the expiration of the time specified in section one of this act from the taking up of any estray under this act, the justice before whom the same was posted, his successor in office or the district attorney of the county, has good reason to believe the taker-up has not duly paid into the county treasury the one-half appraised value as herein required, it is hereby made the special duty of said justice in whose custody the record of the estray remains or the district attorney, to issue a notice to the delinquent, requesting him to appear before the justice on a day

specified, and show cause, if any he can, why judgment should not be entered against him in favor of the county for the sum. Such notice may be delivered to the sheriff of the county or any constable of the proper township, and by him served on the proper party. *Gen. Laws*, 2621.

SEC. 17. *Judgment against Delinquent.*—If no sufficient cause be shown, the justice shall enter judgment against the delinquent for the amount due the county with costs, which judgment shall be a lien upon all the property, real and personal, belonging to the delinquent for the time the same is entered. *Gen. Laws*, 2622.

SEC. 18. *Fees.*—In all cases where any services are performed by any officer or officers under this act, their fees shall be allowed as follows: To the justice, for all services connected with the posting of the animal or animals, which shall include the transcript for the recorder, two dollars; the county recorder, for recording transcript and all other services, two dollars; which fees shall be paid by the taker-up. Said taker-up shall be allowed five dollars for taking up such animal or animals taken up at the same time, and one dollar per head, per month, for the keeping of the same, provided the same be of cattle; and two dollars, provided the same be of the horse kind; and twenty-five cents, provided the same be sheep or goats. *Gen. Laws*, 2623.

[The preceding section does not apply to Trinity, Tuolumne and Sacramento; the two sections following do apply to those counties.]

SEC. 19. In all cases wherein any services are performed by any officer or officers, under this act, their fees shall be allowed as follows, viz: To the justice, for all services connected with the posting of the animal or animals, which shall include the transcript for the recorder, two dollars; to the county recorder, for recording the transcript, one dollar; for all services performed by the justice under this act, other than the above and for all services performed by other officers, the same fees as are allowed to civil officers in similar cases. *Gen. Laws*, 2624.

SEC. 20. *Not Applicable to Certain Counties.*—An act entitled "An act concerning estray animals," passed May 1st, 1851, is hereby repealed: *provided*, that nothing in

this act be construed so as to apply to the counties of San Diego, Santa Barbara, San Bernardino, Los Angeles, Monterey and San Luis Obispo.

SEC. 21. *Appropriation of Moneys arising from Sale of Estrays.*—It shall be the duty of the justice of the peace, upon the receipt of the money proceeding from the sale of such stray or strays, to award to the taker-up the amount as provided for in this act, and pay the same; also, five per cent. of said proceeds to the constable, and pay the residue to the county treasurer, taking his receipt for the same, and transmit it to the county recorder, together with the transcript of marks and brands of the said animal or animals. When the owner of such animal or animals shall appear and prove the same, it shall be the duty of the justice of the peace to transmit a notice of the same to the county recorder. *Gen. Laws*, 2626.

SEC. 22. *Marks and Brands.*—Whenever the brand or mark of any animal claimed to be an estray under the provisions of this act, is recorded in the office of the county recorder of the county of which such animal may be, it shall be the duty of any person upon whose premises such animal may be, to give the owner of such brand or ear-mark, so recorded, twenty days' notice of the fact that such animal is claimed by him to be an estray. It shall be unlawful for any person to post or take up any animal as an estray under the provisions of this act, the brands and ear-marks of which are so recorded, until after such notice has been given. *Gen. Laws*, 2627.

SEC. 23. The provisions of this act shall not apply to the counties of Trinity, Tuolumne and Sacramento.

SANTA CLARA COUNTY.

SEC. 24. *Concerning Estrays.*—Any person finding at any time an estray horse, mare, mule, jack, jenny or any estray cattle, sheep, hogs or goats, or any number of such animals upon his farm or other inclosed premises, or any person finding any or all of said animals running at large, whether the owners of such animals are known or unknown, may take the same up and proceed therewith as hereinafter directed; and no person shall remove such animals from

the possession of the taker-up, or from the possession of the officer into whose hands they may be placed for the purposes of sale, except as hereinafter provided *Gen. Laws*, 2629.

SEC. 25. *Persons taking up Animals—Duties and Notice—Fee of Recorder—Damages to Taker-up—Failure of Owner to Pay.*—The person taking up such animal or animals, shall confine the same in a secure place, within the township where they are taken up, and shall post notices containing a description of them, with the marks and brands, if they have any, and a statement of the place of finding, and the place where such animals are confined, as follows: One notice at the door of the school-house of the school district where they were found, one at the door of the nearest post-office, and shall file one with the county recorder of Santa Clara county; and if the mark or brand of the owner or owners of such animals is recorded in the office where such notice is filed, the recorder shall, within three days after the filing of such notice, deposit a copy thereof in the nearest post-office, with the postage paid thereon, addressed to the owner or owners of said animals, or if owned by a company, to the president or managing agent of such company, at his or their place of residence. The fee of the recorder shall be twenty-five cents for filing the notice, and fifty cents for serving a copy thereof, as required by the provisions of this section. If the owner of the animals posted by virtue of this act fails to appear within twenty days thereafter, and prove his property, and pay damages to the taker-up, as follows: For every sheep, the sum of fifty cents; for every hog or goat, one dollar, and for other animals mentioned in this act, two dollars per head, also, the fees of the recorder, then the finder of such animals may give notice to any constable of the county of the posting of such animals. *Gen. Laws*, 2630.

SEC. 26. *Constable to Sell—Provisos.*—The constable notified shall immediately proceed to sell such animals at public sale, in conformity with the law concerning sales on execution: *provided*, that said owner or owners may redeem said animals at any time before sale, by paying the aforesaid damage, and such costs as may have accrued, to

the officers; and *provided*, further, that such owner or owners may redeem such animals at any time within six months after such sale, by producing satisfactory evidence of his right thereto, and paying to the purchaser the amount of the purchase-money, with five per cent. added thereto, together with the necessary expenses incurred by said purchaser in keeping said animals. *Gen. Laws*, 2631.

SEC. 27. *Fees of Constables.*—The constable making such sales shall be entitled to the same fees as are provided for by law for sales on execution. *Gen. Laws*, 2632.

SEC. 28. *Surplus.*—The constable making such sales shall pay the surplus in his hands, if any remain after payment of costs and damages as above prescribed, to the owner, if he be present and demand the same, and produce satisfactory evidence of his right thereto; and if not, then said constable shall pay such surplus to the county treasurer, and take his receipt therefor, which receipt he shall file with the county recorder of Santa Clara county. If any person or persons shall, within one year thereafter, prove, to the satisfaction of the board of supervisors of said county, that he or they are entitled to such sum or any part thereof, said board of supervisors shall order such sum to be paid over to such person or persons, and if not so ordained, the same shall become a part of the common school fund of said county. *Gen. Laws*, 2633.

SEC. 29. *Validity of Sales.*—No sale made by virtue of this act shall be valid unless the provisions of section twenty-five of this chapter in regard to notices, be fully complied with. *Gen. Laws*, 2634.

SEC. 30. *Damages when more than Ten Animals.*—When more than ten animals belonging to one man are posted at one time, under the provisions of this act, the damages for all above that number shall be one-half of that specified in section three [twenty-five] of this chapter. *Gen. Laws*, 2635.

SEC. 31. All acts and parts of acts in conflict with this act are hereby repealed, so far as they relate to the county of Santa Clara: *provided*, that nothing herein contained shall be construed so as to deprive any person of the right to sue and recover damages for trespass by any animals mentined in this act. *Gen. Laws*, 2636.

ALAMEDA, BUTTE, CALAVERAS, CONTRA COSTA, DEL NORTE, HUMBOLDT, KLAMATH, LAKE, MARIN, MENDOCINO, SAN JOAQUIN, SAN MATEO, SISKIYOU, SOLANO AND YOLO COUNTIES.

SEC. 32. *Notice of Taking Up—Duty of Recorder.*—Any person finding an estray horse, mare, mule, jack, jenny or any estray cattle, sheep, hogs or goats, or any number of them, upon his farm or other inclosed premises, may post notices containing a description of the place of the finding such estrays, with all visible marks and brands upon them, as follows: one notice upon the school-house door of the school district wherein the estrays are found, and upon the door of the nearest post-office and file another with the recorder of the county where the estrays are found; and, in case the mark or brand of the owner or owners of the estrays is recorded in the office where the notice is filed, then the recorder shall, within three days after the filing of the notice, deposit a copy thereof in the post-office, with the postage paid thereon, addressed to the owner or owners of the stock or if owned by a company to the president or managing agent of such company, at his or their place of residence. The fee of the recorder shall be twenty-five cents for filing the notice and fifty cents for serving a copy thereof, as required by this section. *Gen. Laws*, 2637.

SEC. 33. *Damages, etc.*—If the owner of the animals posted by virtue of this act, fails to appear within twenty days thereafter and prove his property, and pay damages to the taker-up, as follows: For sheep, ten cents each; for hogs and goats, fifty cents each, and for all other stock, one dollar each, also the fees of the recorder, then the finder of such estray may give notice to some constable of the county of the posting of such estray. *Gen. Laws*, 2638.

SEC. 34. *Sale of Estrays—Proviso.*—The constable notified shall immediately proceed to sell such estray at public sale, in conformity with the law concerning sales on execution, except the notice of the sale of horses, mares, jacks, mules and jennies, shall not be less than twenty days: *provided*, the owners of estrays may, at any time before sale, retake them by paying the aforesaid damages and such costs as may accrue to the officer. *Gen. Laws*, 2639.

SEC. 35. *Fees.*—The constable making such sale shall be entitled to the same fees as are provided by law for sales on execution. *Gen. Laws*, 2640.

SEC. 36. *Surplus.*—The constable making such sales shall pay the surplus in his hands, if any remain after payment of costs and damages as above described, to the owner, if he demand the same within three months after sale, and if not then he shall pay such surplus to the county treasurer and it shall become a part of the school fund. *Gen. Laws*, 2641.

SEC. 37. No sale made by virtue of this act shall be valid unless the provisions of section one, in regard to notices, be fully complied with. *Gen. Laws*, 2642.

SEC. 38. *Escaping Stock.*—Stock, mentioned in this act, escaping from the lands of the owners or keepers into an adjoining farm or inclosure, shall not be considered estrays under the provisions of this act. *Gen. Laws*, 2643.

SEC. 39. In case above ten estrays belonging to one man are posted at one time, then the damages for all above that number shall be one-half of that specified above. *Gen. Laws*, 2644.

SEC. 40. *Applicable to Certain Counties.*—This act shall apply only to the counties of Napa, San Mateo, Klamath, Del Norte, Marin, Humboldt, Mendocino, Lake, Alameda, Calaveras, Siskiyou and Contra Costa. It shall also apply to the counties of Yolo, Solano, Butte and San Joaquin, except so much thereof as relates to hogs. *Gen. Laws*, 2645.

SEC. 42. *Estrays.*—Any person finding an estray horse, mare, mule, jack, jenny or any estray cattle, sheep, hogs or goats or any number of them, upon his farm or other inclosed premises, may post notices containing a description of the place of the finding of such estrays, with all visible marks and brands upon them, as follows: One notice upon the school-house door of the school district wherein the estrays are found, one upon the door of the nearest post-office and file another with the recorder of the county wherein the estrays are found; and in case the mark or brand of the owner or owners of the estrays is recorded in the office where the notice is filed, then the recorder shall, within three days after the filing of the notice, deposit a copy

thereof in the post-office, with the postage paid thereon, addressed to the owner or owners of the stock or, if owned by a company, to the president or managing agent of such company at his or their place of residence. The fee of the recorder shall be twenty-five cents for filing the notice and fifty cents for serving a copy thereof as required by this section. *Gen. Laws*, 2647.

SEC. 43. *Payment of Damages.*—If the owner of the animals posted by virtue of this act fails to appear within twenty days thereafter and prove his property and pay damages to the taker-up, as follows: For sheep, ten cents each; hogs and goats, fifty cents each, and for all other stock, one dollar each, also the fees of the recorder, then the finder of such estray may give notice to some constable of the county of the posting of such estray. *Gen. Laws*, 2648.

SEC. 44. *Sale—Proviso.*—The constable notified shall immediately proceed to sell such estrays at public sale, in conformity with the law concerning sales on execution, except the notice of the sale of horses, mares, jacks, mules and jennies, shall not be less than twenty days: *provided*, the owners of estrays may, at any time before the sale, retake them by paying the aforesaid damages and such costs as may accrue to the officer. *Gen. Laws*, 2649.

SEC. 45. *Fees of Constables.*—The constable making such sale shall be entitled to the same fees as are provided by law for sales on execution. *Gen. Laws*, 2650.

SEC. 46. *Surplus.*—The constable making such sales shall pay the surplus in his hands, if any remain after payment of costs and damages as above prescribed, to the owner, if he demand the same within three months after sale, and if not, then he shall pay such surplus to the county treasurer, and it shall become a part of the school fund. *Gen. Laws*, 2651.

SEC. 47. *Validity of Sales.*—All sales made by virtue of this act shall be valid if the provisions of section forty-two, in regard to notices, be fully complied with, otherwise they shall be invalid. *Gen. Laws*, 2652.

SEC. 48. Stock, mentioned in this act, escaping from the lands of the owners or keepers into an adjoining farm or inclosure, shall not be considered estrays under the provisions of this act. *Gen. Laws*, 2653.

SEC. 49. In case above ten estrays belonging to one man are posted at one time, the damages for all above that number shall be one-half of that specified in section forty-three of this act. *Gen. Laws*, 2654.

SEC. 50. This act shall apply to the county of Napa and take effect and be in force from and after its passage. *Gen. Laws*, 2655.

SEC. 51. *Acts Repealed.*—All acts and parts of acts in conflict with the provisions of this act are hereby repealed, so far as they apply to Napa county, except the act entitled an act concerning hogs found running at large in the counties of Colusa, Tehama, Butte, Sonoma and Napa, approved March twenty-sixth, eighteen hundred and fifty-seven. *Gen. Laws*, 2656.

SUTTER COUNTY.

SEC. 52. The law in regard to estrays in Sutter county, passed March 17th, 1856, is the same as will be found in this chapter from section one to eighteen, inclusive, except section eight, which makes no difference between horses, etc. and neat cattle, and sections eighteen, as to fees. In Sutter county the justice of the peace shall receive for all services connected with the posting of animals, which shall include the transcript for the recorder, two dollars. The county recorder for recording the transcript, one dollar. The justice for all services under this act, other than the above and for all services performed by other officers, the same fees as are allowed as to civil officers in similar cases.

CHAPTER XLVII.

EVIDENCE.

	SECS.		SECS.
In General	1–15	Impeachment of	45
Subpenas and Service of	16–25	Cross Examination	46
Witness' Privilege	26	Records and Certificate of	47–58
Disobedience to Subpena	27	Secondary Evidence	59–71
Adverse Party Witness	28–33	Respecting Mining Claims	72–74
Who may not be Witnesses	34–42	Affidavits	75–77
Order for Inspection of Book, etc	43	Depositions in the State	78–82
Oath to Witnesses	44	Depositions out of the State	83–91

In General.

SECTION 1. What is evidence? Evidence is that which makes clear or ascertains the very fact or point at issue (3 *Bl. Com.* 367), or it is whatever is lawfully exhibited to a court and jury by which any matter of fact, the truth of which is submitted to investigation, is established or disproved. 1 *Greenl. Ev.* Sec. 1; 1 *Phil. Ev.* 1.

SEC. 2. This word and the words "proof," "testimony" and "witness," are sometimes used as synonymous terms, but such is improper—their meanings are different. By *evidence* is meant that which establishes the fact or truth of a proposition; *proof* is the effect of evidence; *testimony* is simply the statement of a witness under oath, and the *witness* is he who testifies to matters of fact known by him. 3 *Bouv. Inst.* 336.

SEC. 3. Evidence is classified, as *competent*, which means that which the law authorizes and the fact to be proved requires; as *credible*, or that which may be believed; as *incredible*, or that which cannot be believed; as *satisfactory*, or that which induces belief that the thing is true; as *cumulative*, which goes to prove the thing already proved. Evidence of a circumstance, different from other circumstances, already testified to, but tending to prove the same thing, is not cumulative; as *direct*, or that which precisely proves the fact in question; or as *indirect*, which does not prove the fact in question but proves some other fact, the certainty

of which leads to the discovery of the truth of the one sought.

SEC. 4. Certain rules of evidence are laid down to guide magistrates in the discovery of truth. In the establishment of these rules the law intended to adopt the best means of terminating disputes among men. A strict observance of these rules seldom fails to produce convictions as strong as consciousness; and this strong persuasion is termed "moral certainty,"—a condition of the mind only less satisfactory than demonstration or mathematical certainty.

SEC. 5. It is absolutely necessary that every magistrate should enforce the laws of evidence in the investigation of every fact material to issues presented in his court. The rules which govern the production and admission of testimony may be found under this title, and will be considered as to the nature, its objects, the instruments by which facts are established and its effect.

SEC. 6. In considering the nature of evidence, we first present that which is *primary*, or the best of which the case in its nature is susceptible. For example: When a written contract has been entered into, and the object is to prove what it was, the writing itself is primary or the best which can be produced.

SEC. 7. Secondary proof can only be employed or admitted when the primary is lost or destroyed. In that event it becomes the best evidence attainable. It is a rule, that before secondary evidence is admissible, it must be made to appear that the primary cannot be obtained. It often happens, however, that the primary evidence, although not lost or destroyed, cannot be produced in court: such are inscriptions on walls, fixed tables, mural monuments, grave-stones and the like. These, from their nature, cannot be produced in court; secondary evidence must, therefore, be admitted concerning them. Certain records, such as judicial records, registered books and the like, may be proved by authenticated copies. These last-mentioned are made evidence by special law. 2 *Stark.* 274.

SEC. 8. Positive evidence, is that which, if believed, establishes the truth or falsehood of a fact in issue, and

does not arise from any presumption. Evidence is positive when the facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. 1 *Phil. Ev.* 116.

SEC. 9. Circumstantial or presumptive evidence, is the proof of collateral facts, and differs from positive proof in this, that it never proves directly the fact in question. There is a difference between presumptuous and circumstantial evidence. Circumstantial evidence is the means employed to come to the knowledge of one or more facts in order to establish the existence of another; a presumption is an inference as to the existence of one fact from the existence of some other fact, founded on a previous experience of their connection. 1 *Phil. Ev.* 116.

SEC. 10. To constitute such a presumption, a previous experience of the connection between the known and inferred facts is essential. This connection must be of such a nature that, as soon as the evidence of one is established, admitted or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject. Presumptions are either legal and artificial or natural. 3 *Bouv. Inst.* 345.

SEC. 11. Legal presumptions consist of those rules which in certain cases either forbid or dispense with any further inquiry, and are conclusive or which cannot be disputed, and inconclusive or which can be disputed.

SEC. 12. A conclusive presumption, is one which the law will not permit to be overcome by any form of proof. The law, for instance, assumes that an infant under the age of twenty-one years is defective in judgment and, therefore, cannot bind himself by a contract against his interest. Now, in defending an infant in a suit to enforce such contract, it will only be necessary to prove he was an infant under the age of twenty-one years when he made the contract, and the law, without further proof, presumes his incapacity to contract, and will not permit proof to remove the presumption. 3 *Bouv. Inst.* 348.

SEC. 13. Inconclusive presumptions may be overcome by opposing proof. These, like those above considered, are the result of general experience that there is a connec-

tion between certain facts and things, the one being the companion of the other. For instance: The law presumes that a person in the possession of personal property is the owner of it; still it is a presumption which may be contradicted by proof. 3 *Bouv. Inst.* 349.

SEC. 14. Natural presumptions differ from mere presumptions of law in this essential respect, that the latter depend upon and are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, without the aid or control of any particular rule of law, but simply from the course of nature and the habits of society.

SEC. 15. Hearsay evidence, is that kind of knowledge which the witness states he has received or heard from others, and relates to what is written as well as to what is spoken. 1 *Greenl.* Sec. 100.

[The following statutes and decisions of the supreme court of this state, will furnish to justices of the peace a sufficient guide to direct them in matters of testimony:]

Subpenas, and Service of.

SEC. 16. Justices may issue subpenas in any action or proceeding in the courts held by them to any part of the county. *Gen. Laws*, 5550.

SEC. 17. The provisions of title eleven of this act, so far as the same are consistent with the jurisdiction and powers of justices' courts, shall be applicable to justices' courts, and to actions and proceedings therein. *Gen. Laws*, 5551.

SEC. 18. A subpena may require not only the attendance of the person to whom it is directed, at a particular time and place, to testify as a witness, but may also require him to bring any books, documents or other things, in his control, to be used as evidence. No person shall be required to attend as a witness before any court, judge, justice or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial. The subpena shall be issued as follows:

1st. To require attendance before a court or at the trial of an issue therein, it shall be issued in the name and under

the seal of the court before which the attendance is required or in which the issue is pending.

2d. To require attendance out of court, before a judge, justice or other officer, authorized to administer oaths or take testimony in any matter under the laws in this state, it shall be issued by the judge, justice or other officer, before whom the attendance is required.

3d. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this state, it may be issued by any judge or justice of the peace, in places within their respective jurisdiction, with like power to enfore attendance, and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpena directed the attendance of the witness before their courts in a matter pending therein. *Gen. Laws*, 5551, 5340, 5341.

SEC. 19. The service of a subpena shall be made by showing the original, and delivering a copy or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. Such service may be made by any person. If a witness be concealed in a building or vessel, so as to prevent the service of a subpena upon him, any court or judge or any officer issuing the subpena may, upon proof by affidavit of the concealment and of the materiality of the witness, make an order that the sheriff of the county serve the subpena; and the sheriff shall serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed. A person present in court, or before a judicial officer, may be required to testify, in the same manner as if he were in attendance upon a subpena issued by such court or officer. *Gen. Laws*, 5342–5344.

SEC. 20. In case of failure of a witness to attend, the court or officer issuing the subpena, upon proof of the service thereof and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness

and bring him before the court or officer where his attendance was required. *Gen. Laws*, 5349.

SEC. 21. If the witness be a prisoner, confined in a jail or prison within this state, for any other cause than a sentence for felony, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows:

1st. By the court itself in which the action or special proceeding is pending.

2d. By a judge of the supreme court, district court or county judge of the county where the action or proceeding is pending, if before a judge or other person out of court.

Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness and its materiality. If the witness be imprisoned in the county where the action or proceeding is pending, and for a cause other than a sentence for felony, his production may be required. In all other cases, his examination, when allowed, shall be taken upon deposition. *Gen. Laws*, 5350–5352.

SEC. 22. When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons shall be served and returned in like manner as a subpena. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of a contempt, and may be punished accordingly. *Gen. Laws*, 5339.

SEC. 23. A justice of the peace may issue summons to any person, a resident of the proper township, to appear before him, at his office, to act as interpreter in any action or proceeding in the courts held by him. Such summons shall be served and returned in like manner as a subpena issued by a justice. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of a contempt, and may be punished accordingly. *Gen. Laws*, 5550.

SEC. 24. Every person who has been in good faith served with a subpena to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, shall be exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom. The arrest of a witness contrary to the preceding clause shall be void; but an officer shall not be liable to the party for making the arrest in ignorance of the facts creating the exoneration, but shall be liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating:

1st. That he has been served with a subpena to attend as a witness before a court, officer or other person, specifying the same, the place of attendance and the action or proceeding in which the subpena was issued.

2d. That he has not been thus served by his own procurement with the intention of avoiding an arrest.

3d. That he is at the time going to the place of attendance, or returning therefrom or remaining there, in obedience to the subpena. The affidavit may be taken by the officer, and shall exonerate him from liability for discharging the witness when arrested. *Gen. Laws*, 5353.

SEC. 25. It shall be the duty of a witness, duly served with a subpena, to attend at the time appointed with any papers under his control required by the subpena, to answer all pertinent and legal questions; and, unless sooner discharged, to remain till the testimony is closed. A witness shall answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact at issue would be presumed. But a witness shall answer as to the fact of his previous conviction for felony. *Gen. Laws*, 5345–5346.

Witness' Privilege.

SEC. 16. A witness is privileged from answering in two distinct cases, resting upon entirely different grounds. 1st. When the answer tends to subject him to criminal punishment. 2d. When the answer is not to any matter pertinent to the issue, and the answer would disgrace him, and when upon cross-examination he is asked a question, the answer to which would tend to destroy his credibility as a witness. The rule as laid down in 2 *Phillips on Ev.* (431), is the true rule. The practice act (Sec. 408), substantially adopts the same rule, except when the witness has been convicted of a felony. The difference between the two classes of cases is further shown from the fact, that where the answer would tend to disgrace a witness, and the question is not pertinent, the court will not even permit the question to be asked; while in the other case, the question may be asked, and the witness must put himself upon his privilege. When the question is properly put, and the witness refuses to answer, his refusal is given under oath, and that refusal subjects him, practically and morally, to the same disgrace as if he had answered. It is not, then, upon the ground that the answer would disgrace the witness that he is privileged from answering in a case where his answer would tend to subject him to criminal punishment, but solely upon the ground that he shall not be compelled to give evidence against himself in a criminal case. The provision of the constitution was solely intended to protect the witness from being compelled to testify against himself in regard to a criminal offense, and when the answer would not involve criminal consequences the constitution has no provision that will reach the case. The amendatory act of 1855, provides that: "The testimony given by such witness shall in no instance be given against himself in any criminal prosecution;" the witness having thus the protection contemplated by the constitution is bound to answer. 7 *Cal.* 185.

Disobedience to Subpena.

SEC. 27. Disobedience to a subpena, or a refusal to be sworn, or to answer as a witness or to subscribe an affidavit or deposition when required, may be punished as a

contempt by the court or officer issuing the subpena or requiring the witness to be sworn, and if the witness be a party, his complaint may be dismissed or his answer stricken out. A witness disobeying a subpena shall also forfeit to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action. *Gen. Laws*, 5347, 5348.

Adverse Party—Witness.

SEC. 28. If an adverse party refuse to attend and testify at the trial, or to give his deposition before trial or upon a commission when required, his complaint or answer may be stricken out, and judgment taken against him; and he may be also, in the discretion of the court, proceeded against as in other cases for a contempt. *Gen. Laws*, 5357.

SEC. 29. The party who calls upon an adverse party to testify makes him a witness. By making him a witness, he waives his incompetency to be heard for himself, or for his co-defendant or co-plaintiff. 8 *Cal.* 580.

SEC. 30. All persons, without exception, otherwise than as specified in this act, may be witnesses in any action or proceeding. Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of affecting its credibility. No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his interest in the event of the action or proceeding as a party thereto or otherwise; but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition or upon a commission, in the same manner and subject to the same rules of examination as any other witness, on behalf of himself, or either or any of the parties to the action or proceeding. *Gen. Laws*, 5329, 5330.

SEC. 31. Statutes allowing persons to testify in their own cases are in derogation of the common-law rule. They open a wide door to perjury, and cannot be too strictly construed by courts. 2 *Cal.* 63.

SEC. 32. The practice act, section three hundred and ninety-two, provides "that no person offered as a witness shall be excluded on account of his opinion on matters of religious belief," and this follows the fourth section of the first article of the constitution. We can assign to this language no other import than that a witness is competent without any respect to his religious sentiments or convictions—the law leaving this matter of competency to legal sanctions, or, at least, to considerations independent of religious sentiments or convictions. 17 *Cal.* 612.

SEC. 33. The right of a party to an action to testify therein in his own behalf depends entirely upon the statute. 22 *Cal.* 185.

SEC. 34. The following persons shall not be witnesses:

1st. Those who are of unsound mind at the time of their production for examination.

2d. Children under ten years of age, who, in the opinion of the court, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. *Gen. Laws*, 5331, 5332.

SEC. 35. There is no precise age within which children are excluded from testifying. Their competency is to be determined, not by their age, but by the degree of their understanding and knowledge. It is essential that they should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath. It is for the court to decide the question of their competency when they are offered as witnesses. If over fourteen years of age, the presumption is that they possess the requisite knowledge and understanding; but, if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and in its presence, before they can be sworn. 10 *Cal.* 66, 67.

SEC. 36. Mongolians, Chinese, or Indians, or persons having one-half or more of Indian blood, in an action or proceeding wherein a white person is a party. *Gen. Laws*, 5332.

SEC. 37. The term "Indian," as used in the statute, includes the Chinese or Mongolian race; and Chinese cannot be witnesses in suits to which white persons are parties. 13 *Cal.* 73. It is incumbent upon a party basing an objection to the competency of a witness upon his color to prove the disability by clear and indubitable evidence. 14 *Cal.* 145.

SEC. 38. Persons against whom judgment has been rendered upon a conviction for a felony, unless pardoned by the governor, or such judgment has been reversed on appeal. A husband may be witness for or against his wife, and a wife may be a witness for or against her husband, and where husband and wife are parties to an action or proceeding, they, or either of them, may be examined as witnesses in their own behalf, or in behalf of each other, or in behalf of any of the parties thereto, the same as any other witness; but this section shall not apply to cases of divorce, neither shall any husband or wife be competent or compellable to disclose any communication made to him or her by the other during marriage. An attorney or counselor shall not, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon, in the course of professional employment. *Gen. Laws*, 5333, 5334.

SEC. 39. The knowledge of the agent in the course of the agency is the knowledge of the principal. And while the attorney is not permitted to disclose the confidential communications of his client, yet if he acquires information apart from any such communications, he is not protected from disclosing it. 12 *Cal.* 377.

SEC. 40. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs. A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient: *provided*, however, in any suit or prosecution against the physician or surgeon for

malpractice, if the patient or party suing or prosecuting shall give such consent and any such witness shall give testimony, then such physician or surgeon, defendant, may call any other physicians or surgeons as witnesses on behalf of defendant, without the consent of such patient or party suing or prosecuting. A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure. The judge himself or any juror may be called as a witness by either party; but in such case it shall be in the discretion of the court or judge to order the trial to be postponed or suspended and to take place before another judge or jury. *Gen. Laws*, 5335–5338.

SEC. 41. A justice before whom a cause is tried cannot be sworn as a witness in the cause by another justice. He alone is competent to swear witnesses in New York. 1 *Johns.* 520. But if by the return to the *certiorari* it does not appear that any objection was made, it will be intended that he was admitted by consent. 8 *Johns.* 470.

SEC. 42. The whole tendency of the modern decisions, with reference to the competency of witnesses, is to relax rather than to extend the rule of exclusion. 19 *Cal.* 485.

Order for Inspection of Books, etc.

SEC. 43. Any court in which an action is pending or a judge thereof or a county judge, may, upon notice, order either party to give to the other within a specified time an inspection and copy or permission to take a copy of any book, document or paper, in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court may exclude the book, document or paper, from being given in evidence; or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing for contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness. *Gen. Laws*, 5380, 5551.

Oath to Witnesses.

SEC. 44. Every court of this state, every judge or clerk of any court, every justice of the peace and every notary public and every officer authorized to take testimony or to decide upon evidence in any proceeding, shall have power to administer oaths or affirmations. *Gen. Laws*, 5377, 5551. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such. *Gen. Laws*, 5378. Any witness who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed, in the following form: "You do solemnly affirm, that the evidence you shall give in this issue (or matter), pending between ..... and ....., shall be the truth, the whole truth and nothing but the truth." Assent to this affirmation shall be made by the answer: "I do." A false affirmation or declaration shall be deemed perjury equally with a false oath. *Gen. Laws*, 5379, 5551.

Impeachment.

SEC. 45. A witness who is called to impeach another may answer that he would not believe such other witness on oath. This has been the uniform practice in this state, and no injury has resulted from such practice. It may sometimes be necessary to define more clearly the sense the witness entertains of the standing and reputation for truth of the impeached witness. 12 *Cal.* 308.

Cross-examination.

SEC. 46. A witness cannot be cross-examined, except in reference to matters concerning which he has been examined in chief. 7 *Cal.* 561. A witness, on cross-examination, can only be interrogated in regard to such matters as he testified about in his examination in chief, if objection is made on that ground. 25 *Cal.* 212. A party has no right to cross-examine a witness, except as to facts and circumstances connected with the matter stated in his direct examination. If the party wishes to examine upon other matters, he has the opportunity of making the witness his own, and calling him as such upon the trial. 5 *Cal.* 452.

Record and Certificate of.

SEC. 47. The judgment of a court of concurrent jurisdiction, directly upon the point is, as a plea, a bar or as evidence, conclusive between the same parties upon the same matter, directly in question, in another court. Nothing can be assigned for error, nor can any averment be admitted which contradicts a record. A record imparts in itself such incontrollable credit and verity that it admits of no averment, plea or proof, to the contrary, for otherwise there would never be an end of the controversy. But to prevent this rule from working injustice, it is held essential that its operation be mutual. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either. 8 *Cal.* 245, 246. A record is not held conclusive as to the truth of any allegations which were not material or traversable; but as to things material and traversable it is conclusive and final. 14 *Cal.* 229. A judicial record of this state or of the United States, may be proved by the production of the original or a copy thereof, certified by the clerk or other person having the legal custody thereof, under the seal of the court, to be a true copy of such record. *Gen. Laws*, 5383.

SEC. 48. The records and judicial proceedings of the courts of any other state of the United States may be proved or admitted in the courts of this state by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form. *Gen. Laws*, 5384.

SEC. 49. A certificate of exemplification of a judgment in another state, when attested by the clerk under the seal of the court and when the presiding judge of the court certifies that the attestation is in due form of law, is sufficient under the act of congress of May 26th, 1790, to sustain an action upon the judgment in another state. 1 *Cal.* 428.

SEC. 50. The record of a judgment of another state, if certified in conformity with the act of congress, is admissible in evidence in this state. The legislature has the constitutional power to require a less amount of proof than is set forth in the act of congress. A record, also, certified

in conformity with the four hundred and fiftieth section of the practice act would be admissible in the courts of this state. 7 *Cal.* 247.

SEC. 51. Under the act of congress respecting the authentication of the record of a court of one state to be used in another, it is only necessary that the certificate should state the main facts which are made necessary by the act when the offices of judge and clerk are both vested in one person. 12 *Cal.* 181.

SEC. 52. A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the clerk, with the seal of the court annexed, if there be a clerk and seal, or by the legal keeper of the record with the seal of his office annexed, if there be a seal, to be a true copy of such record, together with a certificate of a judge of the court, that the person making the certificate is the clerk of the court or the legal keeper of the record, and in either case that the signature is genuine and the certificate in due form; and, also, together with the certificate of the minister or embassador of the United States or of a consul of the United States in such foreign country that there is such a court, specifying generally the nature of its jurisdiction and verifying the signature of the judge and clerk or other legal keeper of the record. A copy of the judicial record of a foreign country shall also be admissible in evidence upon proof:

1st. That the copy offered has been compared by the witness with the original and is an exact transcript of the whole of it.

2d. That such original was in the custody of the clerk of the court or other legal keeper of the same.

3d. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court, or if there be no such seal or if it be not a record of a court, by the signature of the legal keeper of the original.

Printed copies in volumes of statutes, code or other written law, enacted by any other state or territory or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admit-

ted as evidence of the existing law in the courts and judicial tribunals of such state, territory or government, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such laws. A seal of a court or public office when required to any writ or process or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document or it may be impressed on the paper alone. *Gen. Laws*, 5385–5388, 5551.

SEC. 53. Wherever the acts of public officers are authenticated by their records, these records are evidence in all courts of those acts. 13 *Cal.* 573.

SEC. 54. The party producing a writing as genuine which has been altered or appears to have been altered, after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise. *Gen. Laws*, 5382, 5551.

SEC. 55. A party can waive the production of the written evidence if he pleases, because it is a personal privilege. 10 *Cal.* 166.

SEC. 56. It is error to admit letters in evidence without proving that they were written by the party intended to be charged by their contents. 3 *Cal.* 98.

SEC. 57. To admit proof of the handwriting of the subscribing witness to an instrument, it must be shown that the witness is beyond the jurisdiction of the court or that he could not be found after diligent search for him had been made, that his absence may be inferred. 3 *Cal.* 430.

SEC. 58. A subscribing witness to a written instrument, if within the jurisdiction of the court, must be produced or some sufficient reason given for his absence. Within the jurisdiction of the court, is meant within the state. 12 *Cal.* 306.

Secondary Evidence.

SEC. 59. There shall be no evidence of the contents of a writing other than the writing itself, except in the following cases:

1st. When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made.

2d. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.

3d. When the original is a record or other document in the custody of a public officer.

4th. When the original has been recorded and a certified copy of the record is made evidence by statute.

5th. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole. *Gen. Laws*, 5381, 5551.

SEC. 60. Secondary evidence must always be received with caution, and then not until every means is shown to be exhausted in the effort to procure that which is superior. 5 *Cal.* 251.

SEC. 61. The reason which assigns to a copy of a paper its grade of inferiority to the original instrument is, that the copy may not represent the transaction accurately; it may be simulated; it may be incorrect, and is worthless in everything in which it departs from the original; it bears no marks of authenticity. The fact that the original, which is conclusive of its own contents after proof of its execution, is kept back, affords suspicion that the copy is not what it imports. 13 *Cal.* 573.

SEC. 62. If a party permits his antagonist to prove a fact by secondary evidence, he cannot afterwards object that it was not proved by the best. 13 *Cal.* 84.

SEC. 63. The rule as to the predicate for the admission of secondary evidence of a lost paper, requires that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found; and

further, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. Testimony that the witness searched among papers for the lost document and did not find it, is insufficient. He should swear to a *bona fide* and diligent search. He may have made a careless and indifferent one and yet his statement would be true. Where a witness testified that in the fire of 1851, the party's library and papers were consumed by fire, except a few papers, "which were preserved in a safe," the court say: "It is not pretended that any search was made among the papers thus preserved for the missing deed, and yet is apparent that the safe was the most likely place where a paper so valuable would be kept; and further, there is no statement that it was not kept in the safe." 6 *Cal.* 461, 462.

SEC. 64. *Books of Account.*—This species of evidence is more frequently used in justices' courts than in any other, and it was in that court that the case arose, the rulings in which control in regard to this kind of testimony. Thayer sued Vosburgh before a justice for butcher's meat furnished to Vosburgh and his family. Thayer proved: 1st. That he had been in the daily practice of supplying Vosburgh and his family with meat during the period for which he claimed payment. 2d. He proved by some of those who had dealt with him that he kept just and honest accounts. 3d. That he had no clerk. He then offered his books of account in evidence. They were objected to but admitted by the justice, who gave judgment for Thayer. Vosburgh removed the cause by *certiorari* to the supreme court where the judgment was affirmed and the following restrictions laid down, within which all account books, without regard to the particular employment of the party keeping them, are made evidence in his favor:

1st. The charges to be proved must be such as are matter of book account. A book, therefore, would not be evidence of money lent, had and received, or paid, laid out and expended, for the use of the opposite party.

2d. They are not evidence of a single charge, because

there exists in such case no regular dealing between the parties.

3d. They are not to be admitted where there are several charges, unless a foundation is laid for their admission by proving—

4th. That the party had no clerk [not so in this state]; that some of the articles charged had been delivered; that the books produced are the account-books of the party. He must prove by those who have dealt and settled with him, that he keeps fair and honest accounts. Under these restrictions, they are evidence to be left to the jury. 12 *Johns.* 461.

SEC. 65. By the above decision, account books are made evidence for the consideration of a jury, and, which is the same thing, of a justice where no jury is called for by either party. But the weight of such evidence in the scale of justice is not and cannot be assigned, and must, therefore, depend upon various circumstances calculated to increase or diminish it in the view of enlightened experience. The following remarks of Ch. J. Pennington should be carefully studied when he says: "The manner of keeping books of account in the country, renders them, in many instances, very unsatisfactory evidence, and makes it necessary to examine them with caution. They are admitted from the necessity of the thing in derogation of an ancient precept of the common law, that a party ought not to be permitted to furnish evidence for himself. The constant, continued and repeated, dealings and daily intercourse of a commercial or pecuniary nature, which one citizen hath with another, especially as the country approximates to a manufacturing and commercial state, render it next to impossible to call witnesses to every transaction of the kind, and very laborious and inconvenient to reduce to writing, under the hand of the party, every contract which our wants and interest are hourly leading us to engage in. This hath given rise to the practice of memorandums in the form of books; if these memorandums are to have no effect, it would be a useless waste of time to keep them. These memorandums or books of account are, by the general assent of the community, received as evidence of the trans-

action written in them, and have at length received the sanction of our highest courts of justice. Being, however, the acts of the party producing them, and made by himself for the purposes of evidence, they are so far from being conclusive evidence that they are liable to the strictest scrutiny and are, at most, presumptive evidence; and as such, like all other presumptive evidence, liable to be rebutted or counteracted by every kind of evidence that can be raised against them. There is one essential requisite to the introduction of these books, which is, that the party offering them in evidence must first prove that the book he offers is his book of account in which he usually enters and keeps his general accounts with those persons with whom he deals. For if a man were to keep one book for one man's account, and another book for another, these books would not be such account books as he would be entitled to give in evidence; besides, it is essential that the books offered are made to appear to be the actual books of the person offering them, and not the books of any other person; also, that it is not a book made up for the occasion, but a book in which the person offering it keeps the account of his ordinary dealings, and a book of original entry. Books of account derive much of their credit from the manner in which they are, or ought to be kept; that is, as a kind of diary or daily journal of the transactions of the persons who keep them, who enter every sale or other act as it occurs. Books kept in this way are entitled to the more credit, from two causes: first, that a memorandum made of a transaction at the time it took place is more likely to be correct than if it is entered from memory some time afterwards; second, men are more likely to be tempted to make false entries in their books a long time after the transaction hath happened, and frequently after a difference hath taken place, than at the time and place of the original transaction. Some persons keep their books in this way: they have but one book, and that in the nature of a ledger, wherein they upon one page keep one man's account, and on another page another man's account, and keep no day-book at all. Books kept in this way open the door for the grossest frauds and injustice, and the most scandalous

iniquity is daily practiced under it. I am clearly of opinion myself that books kept in this way ought never to be suffered to appear in a court of justice. But the law is otherwise, and they must be admitted the same as other books when proved to be the ordinary books of account of the persons offering them in which he makes his original entries. But they ought to be considered the most suspicious testimony that can be offered, little better than the declaration of the party in his own favor. Entries are frequently made after the controversy commences, and accounts opened years after the transactions have taken place [which] gave rise to them. And I would here observe, that because the law permits books of account to be given in evidence, that is, shown to a court and jury, it by no means gives validity or authority to the contents of them; but the justice or the jury, in the case the trial is by jury, must draw their own conclusions. The character of the man who keeps the books, the fairness or unfairness of the books from their appearance, the time and manner of making the entries, whether the items are in the ordinary course of a man's trade or business or of an extraneous and suspicious nature, whether any and what other evidence is given to corroborate the charges. All these are proper subjects for the due consideration of the justice or jury." 12 *Johns.* 461.

SEC. 66. After the instructions contained in the abstract given from the opinion of the court in the case of *Thayer* vs. *Vosburgh*, it will be sufficient to give the rule adopted in this state, so far as it has been established, which will safely direct justices of the peace in the admission of this kind of evidence.

SEC. 67. This kind of evidence is not restricted in this state to any particular sort of business or occupation. It is common to the merchant, mechanic and farmer. It seems to be no objection that part of the entries are made by the party and part by his clerk. In the case of *Vosburgh* vs. *Thayer*, it is held that he must have no clerk, but in this state the rule is not restricted to the party himself. If his books of account have been kept by a clerk, they may be proved by the clerk. Whether the book be kept by the party

himself or his clerk to constitute it, admissible evidence of the account, it must contain the following qualifications:

1st. The charges must be confined to goods and chattels sold and delivered, services performed and materials found and provided and the use of such property hired and returned. Work and labor must be done before it is charged. Money and choses in action, such as bonds and notes, are not the subject of book account.

2d. The entries must be made at or near the time of the transaction. They should be memoranda of transactions as they occur. The proximity of time must depend on the course of the business. The party may first enter his accounts on a slate and afterwards transcribe them in his book, if such be his ordinary course in making his entries. Such accounts should, in general, be entered in the book daily.

3d. The entry must be in the book of the party, kept by him for the purpose of his daily accounts, generally, with all those persons who may have dealings with him. They must be made in the prevalent manner of his keeping the book and in a regular course with other charges. If they stand insulated, as on the front page, not falling into regular order with other charges, or be on a separate sheet, or on a leaf torn out of a book or on one of the last pages, separate from other charges by intervening blank leaves, they are not admissible.

4th. The book must contain the original entries made by the party himself and not by another, unless it be by a regular clerk employed by the party and whose business it is to make them.

5th. They may be kept in the form of an ordinary journal or day-book, or ledger-wise, that is, when the account of each man dealing with the party is kept by itself. But it must appear they were intended as an account against the party sought to be charged by them, not as a mere memorandum between the party and others. Erasures and interlineations go to the credit of the book. They may, however, be explained. But if they be gross, suspicious and unexplained, or if any other fraudulent appearances present themselves, the credit of the book will be thereby

destroyed. If the day-book be posted the ledger must be produced, as that may show payments.

6th. The charges must be specific and not in gross or aggregate. Thus: A bricklayer's charge for "one hundred and ninety days' work," was rejected; also, a physician's charge for "medicine and attendance, thirteen dollars." The specific thing charged for must be entered and the price carried out.

SEC. 68. Whether the original entries be relied on as those of the party or be proved by a clerk who made them but who is unable to speak, independently of the book, it must be produced; a copy is not admissible, at least not until the absence of the original be accounted for. But books are in neither case evidence of a higher but rather of an inferior degree than common-law proof. If the latter be attainable, the party may of course resort to it and it will be no objection that his book is not adduced. But the non-production of it, if the book be called for by his adversary, would be a circumstance against him. If the entries were made by a clerk and he be dead, his handwriting may be proved; then on showing that he was clerk the entries may be read as evidence at common law.

SEC. 69. Books are evidence of items, of sale and delivery of goods, services done, materials found and retainer to do the service, together with the prices carried out, respectively. The book must be taken with its charges and credits together.

SEC. 70. A private account book of the plaintiff, kept by himself and containing only an account of money paid, is not evidence to charge the defendant. 2 *Cal.* 422.

SEC. 71. Though the account book of a tradesman, as a general rule, is not admissible to prove a charge for money loaned, yet where it was shown that plaintiff had procured some articles for defendant, which he paid for, and charged as so much money loaned, the book is admissible. Admitting that a trader's book is not admissible to prove a single item, yet where the evidence shows that defendant bought goods at various times, for which only one charge was entered after the order was filled, the account book would seem to be admissible in evidence. 7 *Cal.* 186.

Respecting Mining Claims.

SEC. 72. In actions respecting "mining claims," proof shall be admitted of the customs, usages or regulations, established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action. *Gen. Laws*, 5552.

SEC. 73. In suit for mining claims, the court permitted defendants to introduce in evidence the mining rules of the district, though adopted after the rights of plaintiffs had attached: *Held*, that admitting plaintiffs' rights could not be affected by such rules, still, as defendants claim under them, they were competent evidence to determine the nature and extent of defendants' claim—the effect of such rules upon pre-existing rights being sufficiently guarded by instructions of the court. *Roach* vs. *Gray*, 16 Cal. 384.

SEC. 74. Where the location of a mining claim is made both by posting notices and by designating fixed objects such as trees, shafts and ditches, on or near its exterior boundaries, in an action between two companies involving the title to a portion of the ground, witnesses are not confined in their testimony to a statement of the contents of the notices, but may also state whether the location made included the ground in dispute. The same rules of law relating to estoppel *in pais* apply to mining ground as any any other real estate claimed under a similar kind of title. 23 *Cal.* 11.

Affidavits.

SEC. 75. An affidavit, to be used before any court, judge or officer, of this state, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this state. An affidavit, taken in another state of the United States, to be used in this state, shall be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any judge of a court of record having a seal. An affidavit, taken in a foreign country, to be used in this state, shall be taken before an embassador, minister or consul, of the United States, or before any judge of a court of record

having a seal in such foreign country. When an affidavit is taken before a judge of a court in another state or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, shall be certified by the clerk of the court under the seal thereof. *Gen. Laws*, 5358, 5361, 5551.

SEC. 76. An affidavit need not be signed by the party making it. 15 *Cal.* 53. Courts take judicial notice of the official character of justices of the peace in their own states, and an affidavit in which the official character of the justice before whom it is taken appears, is good. 15 *Cal.* 57, 58.

SEC. 77. The statute giving authority "to recorders to take affidavits to be used in any court of justice in this state," comprehends the power to take and certify the jurat to an answer, which is, in form and substance, an affidavit. 13 *Cal.* 648.

DEPOSITIONS TAKEN IN THIS STATE.

SEC. 78. The testimony of a witness in this state may be taken by deposition in an action at any time, after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

1st. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2d. When the witness resides out of the county in which his testimony is to be used.

3d. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4th. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend. *Gen. Laws*, 5362, 5551.

SEC. 79. Either party may have the deposition taken of a witness in this state before any judge or clerk or any justice of the peace or notary public in this state, on serving on the adverse party previous notice of the time and place

of examination, together with a copy of an affidavit showing that the case is one mentioned in the previous section. At any time during the forty days immediately after the service of summons by publication has been completed, and at any time thereafter, when the defendant has not appeared, the notice required by this section may be served on the clerk of the court where the action is pending. Such notice shall be at least five days and, in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge by order prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice. *Gen. Laws*, 5363, 5551.

SEC. 80. Either party may attend such examination and put such questions, direct and cross, as may be proper. The deposition when completed shall be carefully read to the witness and corrected by him in any particular, if desired; it shall then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelop or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail or by some safe private opportunity, and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken by the reason of the absence or intended absence from the county of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial that the witness continues absent or infirm, to the best of the deponent's knowledge or belief. The deposition thus taken may be also read in case of the death of the witness. *Gen. Laws*, 5364, 5551.

SEC. 81. When a deposition has been once taken, it may

be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it. *Gen. Laws*, 5365, 5551.

SEC. 82. Justices may issue commissions to take the depositions of witnesses out of this state and settle interrogatories to be annexed thereto, and direct the manner in which the commissions shall be returned. *Gen. Laws*, 5551.

DEPOSITIONS TAKEN OUT OF THIS STATE.

SEC. 83. The testimony of a witness out of the state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen therein. *Gen. Laws*, 5366, 5551.

SEC. 84. The deposition of a witness out of this state shall be taken upon commission issued from the court, under the seal of the court, upon an order of the judge or court or county judge, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace selected by the officer granting the commission, or to a commissioner appointed by the governor of this state to take affidavits and depositions in other states. *Gen. Laws*, 5367, 5551.

SEC. 85. Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission, or when the parties agree to that mode the examination may be without written interrogatories. *Gen. Laws*, 5368, 5551.

SEC. 86. The commission shall authorize the commissioner to administer an oath to the witness and to take his deposition in answer to the interrogatories or when the examination is to be without interrogatories in respect to the question in dispute, and to certify the deposition to the court in a sealed envelop, directed to the clerk or other person designated or agreed upon and forwarded to him by mail or other usual channel of conveyance. *Gen. Laws*, 5369, 5551.

SEC. 87. A trial or other proceeding shall not be postponed by reason of a commission not returned, except upon evidence satisfactory to the court that the testimony of the witness is necessary and that proper diligence has been used to obtain it. *Gen. Laws*, 5370, 5551.

SEC. 88. An order to take testimony, by deposition, should specify the notice to be given to the adverse party. A deposition taken upon an order without such notice, where the opposite party has not had reasonable notice, ought not to be read in evidence. 5 *Cal.* 444.

SEC. 89. It being objected by plaintiff to a deposition: 1st, that the copy of the order of the judge fixing the time for taking it did not mention the notice to be given the adverse party; 2d, that no correct copy of said order was served; 3d, that no sufficient notice to take the deposition was ever given, the objection was overruled, "because the original order of the judge, made on affidavit, fixed the time of notice at three days, and because plaintiff's counsel acknowledged service in writing of a copy thereof March 8th, 1859, more than three days before the taking of the deposition": *Held*, that there was no error. The objection assigned was a matter to be considered by the court, and its discretion seems to have been properly exercised. Reasonable notice should be given to the party of the time and place of taking testimony; but what is reasonable notice depends upon the particular circumstances. 17 *Cal.* 43.

SEC. 90. Proof of notice to take a deposition where the written notice was defective, was held good when made by parol and conforms substantially to the statute. A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice. 3 *Cal.* 97.

SEC. 91. A certificate to a deposition must state that the deposition was read to the witness before signing; it should set out an actual compliance with all the requirements of the statute. 6 *Cal.* 561.

CHAPTER XLVIII.

EXECUTION.

	SECS.		SECS.
When it shall Issue	1- 2	Certificate of Sale	49–51
What to Contain	3	Purchaser Refusing to Pay	52–53
To whom Directed	4	Redemption	54–59
In what Manner Served	5- 9	Purchaser Evicted may Recover Price of	60
Property Exempt from	10–32	Deed	61–62
How Levy made	33–41		
Sale Under—Notice of	42–48		

When it shall Issue.

SECTION 1. Execution may issue at any time within five years for the enforcement of a judgment rendered in a justice's court. *Pr. Act*, 600.

SEC. 2. It must issue within five years after a judgment is obtained. After that time there is no judgment. 8 *Cal.* 512. The clerk of the county cannot issue an execution on a judgment rendered by a justice of the peace after five years shall have elapsed from the date of its rendition. 26 *Cal.* 156.

What to Contain.

SEC. 3. The execution shall be directed to the sheriff or constable and be subscribed by the justice by whom it was rendered or by his successor, and shall bear date the date of its delivery to the officer. It shall intelligibly refer to the judgment, by stating the names of the parties and the name of the justice before whom, and of the county and the township or city where and the time when it was rendered; the amount of judgment, if it be for money, and if less than the whole is due, the true amount due thereon. *Pr. Act*, 601.

To Whom Directed.

SEC. 4. The officer to whom the execution is directed shall proceed to execute it in the same manner as the sheriff is required to proceed upon executions, and either before or after the return of the execution, if the same remain unsatisfied, the judgment debtor shall be entitled to an order from the justice, requiring the judgment debtor to

attend, at a time to be designated in the order, and answer concerning his property before such justice, and his attendance may be enforced, and he may be examined on oath concerning his property, and any person alleged to have property in his hands, or money, effects or credits, of the judgment debtor, may also be required to attend and be examined, and the justice may order property in the hands of the judgment debtor or any other person, not exempt from execution, belonging to such debtor to be applied toward the satisfaction of the judgment, and the justice may enforce such order by imprisonment until complied with; but no judgment debtor or other person shall be required to attend before the justice out of the county in which he resides. *Pr. Act*, 602.

In what manner Served.

SEC. 5. By virtue of the two last sections a constable may serve an execution out of his township. 17 *Cal.* 394.

SEC. 6. The property liable to be seized under execution is the same as that which may be attached, viz: goods, chattels, moneys and other property, both real and personal, or any interest therein belonging to the judgment debtor not exempt by law, and whatever property may be held by attachment [see ATTACHMENT] is liable under execution. Shares and interest in any corporation or company, and debts and credits on all other property, both real and personal, and any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment. Gold dust shall be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property shall not be affected by the execution. *Pr. Act*, 217.

SEC. 7. Property in anything is the right which a man has to its possession or enjoyment; it is the interest which a man has in lands and chattels to the exclusion of others. 9 *Cal.* 142. Property in lands is not confined to title in fee, but includes any usufructuary interest (*State of California* vs. *Moore*, 12 Cal. 56) and embraces all titles, legal or equitable, perfect or imperfect. *Leese* vs. *Clark*, 20 Cal. 388.

SEC. 8. If the property levied on be claimed by a third person as his property, the same proceedings may be had by the officer as in attachments when property attached is so claimed. See ATTACHMENTS.

SEC. 9. Where property is levied on by a constable or sheriff, by virtue of an attachment or execution, as the property of the defendant in the suit, and is claimed by a third party, and a jury is called to try the right of property under the claim, and the verdict of the jury is against the claimant, this verdict is no protection to the officer in a suit brought against him by the defendant, nor is it admissible in evidence as a defense. *Seldon* vs. *Loomis*, 28 Cal. 122.

Property Exempt.

SEC. 10. The following property shall be exempt from execution, except as herein otherwise specially provided:

1st. Chairs, tables, desks and books, to the value of one hundred dollars, belonging to the judgment debtor.

2d. Necessary household, table and kitchen, furniture, belonging to the judgment debtor, including stoves, stovepipe and stove furniture, wearing apparel, beds, bedding and bedsteads, and provisions actually provided for individual or family use, sufficient for one month.

3d. The farming utensils or implements of husbandry of the judgment debtor; also, two oxen or two horses, or two mules and their harness, four cows with their sucking calves, one cart or wagon, and food for such oxen, horses, cows or mules, for one month; also, all seed, grain or vegetables, actually provided, reserved or on hand, for the purpose of planting or sowing, at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars.

4th. Tools or implements of a mechanic or artisan, necessary to carry on his trade; the instruments and chest of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession, with their scientific and professional libraries; the law libraries of attorneys and counselors, and the libraries of ministers of the gospel.

5th. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also, his sluices,

pipes, hose, windlass, derrick, cars, pumps, tools, implements and appliances, necessary for carrying on any kind of mining operations not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules or oxen, with their harness and food for such horses, mules or oxen, for one month, when necessary to be used for any whim, windlass, derrick, car, pump or hoisting gear.

6th. Two oxen, two horses or two mules and their harness, and one cart or wagon, one dray, one truck, one *coupè*, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer, habitually earns his living, and one horse with vehicle and harness or other equipments, used by a physician, surgeon or minister of the gospel, in making his professional visits, with food for such oxen, horses or mules, for one month.

7th. All fire engines, hooks and ladders, with the carts, trucks and carriages, hose, buckets, implements and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state.

8th. All arms, uniforms and accouterments required by law to be kept by any person.

9th. All court-houses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers and appurtenances, belonging and pertaining to the court-house, jail and public offices, belonging to any county of this state, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of the fire departments and military organizations, and the lot and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state; but no article or species of property mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon.

10th. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next

preceding the levy of execution or levy of attachment, when it shall be made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family, residing in this state, supported wholly or part by his labor. *Stats.* 1870.

The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within thirty days next preceding the order, shall not be so applied, when it shall be made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the use of a family supported wholly or partly by his labor. *Pr. Act*, Sec. 243. In addition to the property now exempted by law from sale or levy on execution, there shall be exempted one sewing machine, of a value not exceeding one hundred dollars, in actual use by each debtor or the family of the debtor. *Stats.* 1864, 92.

SEC. 11. Where certain household furniture is claimed as exempt from execution, the fact that the number of beds claimed—six in all—is greater than is required for the immediate and constant use of the family, is no objection. Such a construction of the statute would be too narrow. 15 *Cal.* 266.

SEC. 12. Where a party was absent in San Francisco at the time such furniture was sold on execution, on account of sickness in his family, it is a sufficient excuse for not claiming the exemption at the time, the defendant, plaintiff in execution, being aware of such claim—it having been made on a previous seizure. 15 *Cal.* 266.

SEC. 13. In suit against plaintiff in execution for the value of household furniture sold thereunder, as being exempt, defendant offered to show that plaintiff agreed to place the property in the hands of a third person, to be sold for the benefit of defendant, the creditor: *Held*, that the evidence was not admissible, because such agreement does not necessarily waive the exemption from forced sale. 15 *Cal.* 266.

SEC. 14. An execution debtor who has more horses than the number exempt by law, may elect which he claims as exempt, but such election must be made and the officer notified thereof, either at the time of the levy or within a reasonable time thereafter, or the right to elect will be deemed waived. 22 *Cal.* 526.

SEC. 15. The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them or other head of a family, shall not be subject to forced sale in execution or any final process from any court. *Gen. Laws*, 3541.

SEC. 16. Such exemption shall not extend to any me chanic's, laborer's or vendor's, lien lawfully obtained, nor to any mortgage or other lien, lawfully taken or acquired, to secure the purchase-money for said homestead. *Gen. Laws*, 3542.

SEC. 17. The statute does not contemplate that homesteads should be carved out of land held in joint tenancy or tenancy in common, because it has not provided any mode for their separation and ascertainment. 5 *Cal.* 243.

SEC. 18. Where a partnership in embarrassed circumstances converts its means, upon the strength of which it has obtained credit, into real estate, to be claimed as a homestead by one of the firm, for the purpose of placing those means beyond the reach of the creditors, the land is liable to the executions of the creditors, notwithstanding the declaration of homestead. 23 *Cal.* 514.

SEC. 19. Where the vendor of the plaintiff (in replevin) is in insolvent or embarrassed circumstances, and makes a sale to discharge debts which are liens or charges upon his homestead, for the purpose of saving it to himself, of all which the plaintiff is aware at the time he makes the purchase, the transaction is certainly calculated to hinder, delay or defraud, creditors. Although the law secures the homestead from execution arising from ordinary indebtedness, it is yet made chargeable for debts by the act of the parties interested in its preservation, and in some cases by operation of law. Where such cases exist it would seem to

be only fair that the homestead should remain answerable for the debts charged upon it, and not, after becoming a source of credit, be relieved, intentionally, by the disposition of all the other property of the debtor, leaving nothing for the satisfaction of the other creditors. Such a sale, except to a creditor in payment of his debt alone, and free from knowledge of or collusion with the object of the debtor, must be considered a fraud in fact and in law. It is a sale with the direct intent of benefit or advantage to the seller to the injury of the creditors. 5 *Cal.* 489, 490.

SEC. 20. The shares held by the members of all associations, incorporated under the provisions of an act to authorize the formation of corporations, to provide the members with homesteads or lots of land suitable for homesteads. *Gen. Laws*, 1072.

SEC. 21. Life insurance, when to secure the same an annual payment not exceeding five hundred dollars is made (*Pub. Laws*, 1868–70); also the shares held by the members of all associations, incorporated under the provisions of this act, together with any amount of deposits or assessments, shall be exempt from attachment or sale on execution for debt, to an extent not exceeding one thousand dollars in such shares, deposits or assessments, at their par value: *provided*, the person holding such shares is not the owner of a homestead under the homestead laws of this state. *Gen. Laws*, 1092.

SEC. 22. A being indebted to B, delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B should proceed and sell the lumber, and pay his debt out of the proceeds. The lumber was afterwards levied upon by the defendants under an execution in their favor against A, as his property: *Held*, that the lumber was not subject to seizure under an execution against A, without payment, in the first place, of his indebtedness to B. 1 *Cal.* 124.

SEC. 23. The franchises of a corporation are privileges granted and held in personal trust, and cannot be transferred by forced sale or by voluntary assignment, except by permission of the government, and when that permission is granted the mode of transfer pointed out must be followed.

The levy upon and sale of a road by virtue of an execution gives to the purchaser no right or title to the same, for being the property of the public the defendant in the execution has no interest therein which can be conveyed by the officer. 24 *Cal.* 474.

SEC. 24. A ferry is a franchise, and is not the subject of levy, sale or delivery, under execution. It involves a personal trust granted by the sovereign, upon conditions imposed upon the grantee alone, and his liability cannot be removed by substitution. 5 *Cal.*, 471.

SEC. 25. A ferry-license, being a franchise, is not the subject of levy and sale under execution. Such a sale is a nullity, and the purchaser acquires no right thereby. 7 *Cal.* 287.

SEC. 26. The separate property of the wife is not liable for the debts of the husband. See Sec. 14, Article XI of the Constitution; also Sec. 9 of the Act regulating the relation of Husband and Wife; approved May 12th, 1853, 165; see, also, *George* vs. *Ransom et al.*, *sequitur*.

SEC. 27. This question arises from the record in this case: Can a creditor of the husband subject the proceeds or dividends of the separate estate of the wife to his claim? In this case the property sought to be subjected was the dividends of certain stock purchased by the wife with her separate funds. By the fourteenth section of article eleven of the constitution it is provided: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property." By section nine of the act regulating the relation of husband and wife (*Wood's Digest*, 488) it is enacted: "The husband shall have the entire management and control of the common property, with the like absolute power of disposition and of his own separate estate; and the rents and profits of the separate estate of either husband or wife shall be deemed common property, unless in the case of the separate prop-

erty of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised or given, to her, that the rents and profits thereof shall be applied to her sole and separate use; in which case the entire management and disposal of the rents and profits of such property shall belong to the wife, and shall not be liable for the debts of the husband." We think the legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her and given to the husband or to his creditors. If the constitutional provision be not a protection to the wife against the exercise of this authority, the anomaly would seem to exist of a right of property in one divested of all beneficial use—the barren right to hold in the wife and the beneficial right to enjoy in the husband. It is not perceived that property can be in one in full and separate ownership with a right in another to control it and enjoy all of its benefits. The sole value of property is in its use; to dissociate the right of property from the use, in this class of cases, would be to preserve the name—the mere shadow—and destroy the thing itself, the substance. It would be to make the wife the trustee for the husband, holding the legal title while he held the fruits of that title. This could no more be done, in consistency with our ideas of property, during the lifetime of the wife, than for all time. This was the view taken by the judge below, and this judgment is affirmed. 15 *Cal.* 323, 324.

SEC. 28. The separate property of the husband shall not be liable for the debts of the wife contracted before the marriage, but the separate property of the wife shall be and continue liable for all such debts. *Gen. Laws*, 3575.

SEC. 29. Property in the custody of the law is not liable to seizure without an order from the court having charge thereof. 7 *Cal.* 37.

SEC. 30. Where two mules are claimed as exempt from forced sale on execution, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question or that he is one of the persons mentioned in the statute. 10 *Cal.* 394.

SEC. 31. The sheriff or constable to whom the execution

is directed shall proceed to execute the same in the same manner as the sheriff is required by the provisions of title seven of this act to proceed upon executions directed to him, and the constable, when the execution is directed to him, shall be vested for that purpose with all the powers of the sheriff. *Gen. Laws*, 5533.

SEC. 32. The sheriff shall execute the writ against the property of the judgment-debtor by levying on a sufficient amount of property if there be sufficient, collecting or selling the things in action and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, or depositing the amount with the clerk of the court. Any excess in the proceeds over the judgment and the sheriff's fees shall be returned to the judgment-debtor. When there is more property of the judgment-debtor than is sufficient to satisfy the judgment and the sheriff's fees, within the view of the sheriff, he shall levy only on such part of the property as the judgment-debtor may indicate: *provided*, that the judgment-debtor be present at and indicate at the time of the levy such part; and *provided*, that the property indicated be amply sufficient to satisfy such judgment and fees. *Gen. Laws*, 5159.

How Levy Made.

SEC. 33. The property discovered in proceedings supplementary to execution is in the custody of the law, and must be applied under the order of the court, and not given up to the creditor except in proper cases. 7 *Cal.* 202.

SEC. 34. The service of a copy of execution and notice of garnishment upon a third party constitutes no lien on property of the debtor in his hands capable of manual delivery. 6 *Cal.* 196.

SEC. 35. If the property levied on be claimed by a third person as his property, the sheriff shall summon from his county six persons qualified as jurors between the parties, to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses shall be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may

relinquish the levy, unless the judgment creditor gives him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff and the witnesses, shall be paid by the claimant, if the verdict be against him, otherwise by the plaintiff. On the trial the defendant and the claimant may be examined by the plaintiff as witnesses. *Gen. Laws*, 5157.

SEC. 36. The interest of a miner in his mining claim is property, and, not having been exempted by law, may be taken in execution. 9 *Cal.* 142. Property is the exclusive right of possessing, enjoying and disposing, of a thing; it is the "right and interest which a man has in lands and chattels to the exclusion of others;" and the term is sufficiently comprehensive to include every species of estate, real or personal.

SEC. 37. If a judgment be the subject of levy and sale, as appellant contends, the purchaser would only take as assignee. No title to the chose in action different from that passing by act of assignment, made immediately by the owner of it, would be communicated by the sheriff's sale. A judgment is not a negotiable instrument like a bill of exchange, by the law merchant, but is a mere *chose in action*, vesting an equitable right in the assignee to the proceeds of it, with a right to the usual and legal means of collecting the amount due on it. But in this case it appears, that before the levy and sale, the judgment had been assigned, for value, by the holder of it to Moore & Welty. Their right first accruing, by the assignment of the execution debtor, took precedence of the sheriff's assignment subsequently made. The sheriff sold the interest of the creditor in the judgment, but the title was already gone before the levy. Between two *bona fide* purchasers of a *chose in action*, not negotiable, the purchaser first in time is prior in right. It does not avail to say that the execution sale carried the legal title and the prior assignment only an equity; the title sold in both cases is precisely the same—there being no difference, so far as affects the quality of the interest conveyed between a sale made voluntarily by the party himself and a sale made for him by the sheriff who, in making it, acts as his agent. 18 *Cal.* 438.

SEC. 38. Where the execution debtor owns property jointly with another, a sheriff, who has such execution, has the right to levy on such property and take it into possession for the purpose of subjecting it to sale. 10 *Cal.* 380.

SEC. 39. In an action against a sheriff for seizing and selling certain personal property, alleged to belong to plaintiff, under an execution against one Teal, it being averred in the answer that the property belonged to Teal: *Held*, that evidence tending to prove it was the partnership property of Teal and plaintiff, was proper, and that if they were partners and as such owned the property, plaintiff could not recover. *Hughes* vs. *Boring*, 16 Cal. 82.

SEC. 40. The interest of one partner in partnership property is such an estate under our statute as may be sold for his debts; it is a legal estate in chattels. It is true that, as between partners, the interest of each is only the residuum of the property left after the settlement of the firm debts; and that the rights of firm creditors and the several partners are paramount to the claims of separate creditors of the firm. But this interest of the partner thus defined is subject to levy for his debts. 12 *Cal.* 198.

SEC. 41. A ferry boat, used for the transportation of passengers, teams, etc., across a stream is not exempt from execution because the ferry is on the mail-route and the boat is used also to convey the United States mail across the stream. 23 *Cal.* 257.

Sale Under—Notice of.

SEC. 42. Before the sale of property on execution, notice thereof shall be given as follows:

1st. In case of perishable property, by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property.

2d. In case of other personal property, by posting a similar notice in three public places in the township or city where the sale is to take place, not less than five nor more than ten days successively.

3d. In case of real property, by posting a similar notice,

particularly describing the property, for twenty days successively, in three public places of the township or city where the property is situated, and also when [where] the property is to be sold, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one.

4th. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section shall state the kind of money or currency in which bids may be made at such sale, which shall be the same as that specified in the judgment. *Gen. Laws*, 5160.

SEC. 43. The provisions of statutes similar to ours, with respect to levy and notice of sale under execution, are merely directory, and the failure of the officer to comply with the requirements of the law, in this respect, would not vitiate such sale, but the party aggrieved by his neglect is left to his remedy by an action against the officer. 6 *Cal.* 50.

SEC. 44. The remedy against a sheriff for selling property on insufficient notice, is confined to the statutory remedy. 17 *Cal.* 626.

SEC. 45. An officer selling without the notice prescribed by section forty-two of this chapter, shall forfeit five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment [if the judgment be satisfied before sale], shall forfeit five hundred dollars. *Gen. Laws*, 5161.

SEC. 46. An action cannot be maintained by the defendant in an execution to recover of the officer the penalty prescribed by section two hundred and twenty-two of the practice act for selling without proper notice, unless by a sale so made the complainant has been deprived of his property. If the attempted sale is a nullity and passes no title, no injury has been sustained, and no right of action for the forfeiture accrues. 22 *Cal.* 263.

SEC. 47. All sales of property under execution shall be made at auction to the highest bidder, and shall be made between the hours of nine in the morning and five in the

afternoon; after sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution nor his deputy, shall become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property and consisting of several known lots or parcels, they shall be sold separately; or when a portion of such real property is claimed by a third person and he requires it to be sold separately, such portion shall be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels or of articles which can be sold to advantage separately, and the sheriff shall be bound to follow such directions. *Gen. Laws*, 5162.

SEC. 48. If contingent and complicated contracts are the subject of levy and sale, they cannot be levied upon and sold without being in the possession of the officer at the sale to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action with all of its conditions and covenants, and a full explanation of the facts determining the value of the chose be given by the levy and announced at the sale. It is of the essence of every public sale that there be a description sufficient to apprise the bystanders, with reasonable accuracy, of what is sold or offered. 13 *Cal.* 15, 23, 24.

Certificate of Sale.

SEC. 49. When the purchaser of any personal property, capable of manual delivery shall pay the purchase-money, the officer making the sale shall deliver to the purchaser the property, and if desired shall execute and deliver to him a certificate of the sale and payment. Such certificate shall convey to the purchaser all the right, title and interest, which the debtor had in and to such property on the day the execution was levied. *Gen. Laws*, 5166.

SEC. 50. A sheriff's bill of sale of personal property sold

on execution need not contain all the formalities of a regular certificate. 25 *Cal.* 545.

SEC. 51. When the purchaser of any personal property, not capable of manual delivery, shall pay the purchase-money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall convey to the purchaser all right, title and interest, which the debtor had in and to such property on the day the execution was levied. Upon a sale of real property, the purchaser shall be substituted to and acquire all the right, title, interest and claim, of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases, the property shall be subject to redemption, as provided in this act. The officer shall give to the purchaser a certificate of sale, containing:

1st. A particular description of the real property sold.

2d. The price bid for each distinct lot or parcel.

3d. The whole price paid.

4th. When subject to redemption, it shall be so stated.

And when the judgment under which the sale has been made is payable in a specified kind of money or currency, the certificate shall also state the kind of money or currency in which such redemption may be made, which shall be the same as that specified in the judgment. A duplicate of such certificate shall be filed by the officer in the office of the recorder of the county. *Gen. Laws*, 5167.

Purchaser Refusing to Pay.

SEC. 52. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss with costs, by motion, upon previous notice of five days before any court, or before any justice of the peace, if the same shall not exceed his jurisdiction. Such court or justice shall proceed in a summary manner and give judgment, and issue execution therefor forthwith, but the defendant may claim a jury. And the same proceedings may be had against any

subsequent purchaser who shall refuse to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing. The two preceding sections shall not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser and the amount collected from the purchaser refusing to pay. *Gen. Laws*, 5163–5165.

SEC. 53. A purchaser at sheriff's sale acquires no rights whatever against the sheriff for property sold, unless at the time of the sale he has paid down in cash the whole of the purchase money. 5 *Cal.* 68.

Redemption.

SEC. 54. Property sold subject to redemption, as provided in this act, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons or their successors in interest:

1st. The judgment-debtor or his successor in interest in the whole or any part of the property.

2d. A creditor, having a lien by judgment or mortgage on the property sold or on some share or part thereof subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are termed redemptioners.

The judgment-debtor or redemptioner may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with twelve per cent. thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase and interest on such amount; and if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest. *Gen. Laws*, 5169, 5170.

SEC. 55. It is certain, from the explicit language of the foregoing section, that the purchaser at sheriff's sale may have a lien upon the property prior to that of the redemptioner. The fact that he is the creditor does not divest his lien. He may be both a creditor and a purchaser and still have a prior lien to that of the redemptioner. This can

only be upon the principle that the legal estate is still in the judgment-debtor until the delivery of the sheriff's deed, and if in the debtor, it is such an estate as may be the subject of a lien, a sale under execution or of a conveyance by deed from the debtor. In all cases where a mere lien exists, the legal estate must be in some other party than the mortgagee. This legal estate and the consequent right to discharge the lien and save the estate is of value and can be sold. 9 *Cal.* 118.

SEC. 56. If property be so redeemed by a redemptioner, either the judgment-debtor or another redemptioner may within sixty days after the last redemption again redeem it from the last redemptioner, on paying the sum paid on such last redemption with four per cent. thereon in addition and the amount of any assessment or taxes which the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest: *provided*, that the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as the debtor or a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him with interest thereon, and the amount of any liens other than the judgment under which the property was sold held by the last redemptioner previous to his own, with interest. Notice of redemption shall be given to the sheriff; if no redemption be made within six months after the sale, the purchaser or his assignee shall be entitled to a conveyance, or if so redeemed, whenever sixty days have elapsed and no other redemption has been made and notice thereof given, the time for redemption shall have expired and the last redemptioner or his assignee shall be entitled to a sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated and he be restored to his estate. The payments mentioned as aforesaid may be made to the purchaser or redemptioner, as the

case may be, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, said payments shall be made in the same kind of money or currency, and a tender of the money shall be equivalent to payment. *Gen. Laws*, 5171, 5172.

A redemptioner shall produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff:

1st. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court or of the county where the judgment is docketed, or if he redeem upon a mortgage or other lien, a note of the record thereof certified by the recorder.

2d. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or of a subscribing witness thereto.

3d. An affidavit by himself or his agent, showing the amount then actually due on the lien.

Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property by order granted with or without notice, on the application of the purchaser or the judgment-creditor. But it shall not be deemed waste for the person in possession of the property at the time of sale or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repair of fences, or for fuel in his family while he occupies the property. The purchaser from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof. *Gen. Laws*, 5171–5175.

SEC. 57. A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment-debtor before the expiration of the six

months allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he purchased. The sale operates as an assignment of the lease for the time. 7 *Cal.* 46.

SEC. 58. A judgment-debtor who redeemed his property within twenty-one days after the sheriff's sale, but who had received from his tenants in possession four hundred dollars rent between the day of sale and the redemption, was held liable to the purchaser at the sale for the amount so received. 17 *Cal.* 596.

SEC. 59. At sheriff's sale of premises in a foreclosure suit by plaintiff against R., plaintiff became the purchaser. During the six months succeeding the sale, C., acting as agent of defendants, occupied the premises, carrying on the business of a saloon. At the end of six months, defendants, as mortgagees, redeemed: *Held*, that the defendants are tenants in possession within the two hundred and thirty-sixth section of the practice act, and must pay plaintiff for use and occupation for the six months. 18 *Cal.* 113.

Purchaser Evicted may Recover Price of.

SEC. 60. If the purchaser of real property, sold on execution or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale or his successor in interest, fail to recover possession, in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and when so revived the said judgment shall have the same effect as an original judgment of the said court of that date and bearing interest as aforesaid, and any other or after-acquired property, rents, issues or profits, of the said debtor, shall be liable to levy and sale under execution in

satisfaction of such debt: *provided*, that no property of such debtor sold *bona fide* before the filing of such petition, shall be subject to the lien of said judgment; and, *provided* further, that notice of the filing of such petition shall be made by filing a notice thereof in the recorder's office of the county where such property may be situated; and that said judgment shall be revived in the name of the original plaintiff or plaintiffs, for the use of said petitioner, the party in interest. *Gen. Laws*, 5176.

Deed.

SEC. 61. Although a sheriff's deputy may execute a deed for property sold under execution, he must execute it in the name of the sheriff. If executed in his own name it is decisive against the party claiming under it. 3 *Cal.* 266.

SEC. 62. A sheriff's or constable's deed, executed under an execution sale which does not recite the judgment on which the execution was issued, is void. 25 *Cal.* 230.

CHAPTER XLIX.

FENCES.

SECTION 1. In Amador, San Diego, Santa Barbara, Trinity, Klamath and Siskiyou counties, a lawful fence must be: If made of stone, four and one-half feet high; if made of rails, five and one-half feet high; if made upon the embankment of a ditch three feet high from the bottom of the ditch, the fence must be two feet high; it must be substantial and reasonably strong and made so close stock cannot get their heads through it, and if made to turn small stock, sufficiently tight to turn them. A hedge fence, to be considered a lawful fence, must be five feet high and sufficiently close to turn stock. *Gen. Laws*, 3029.

SEC. 2. The following is a lawful fence in all the counties, except the above-named counties and Tuolumne, San Bernardino, Colusa, Placer, Yuba, Shasta, Tehama, Contra Costa, Sonoma, El Dorado and Marin:

1st. Wire fence shall be made of posts not less than twelve inches in circumference, set in the ground not less

than eighteen inches and not more than eight feet apart, with not less than three horizontal wires, each one-quarter inch in diameter, the first eighteen inches from the ground, the other two at intervals of one foot between each, well stretched and securely fastened, with one slat, rail, pole or plank, securely fastened to the post not less than four and one-half feet from the ground.

2d. Post and rail fences shall be made of posts, of the same size and distance apart and depth in the ground as above, with three rails, slats or planks, of suitable size and strength, the top one to be four and one-half feet from the ground, the other two at equal distances between the first and the ground, fastened to the post.

3d. Picket fences shall be of the same height as above, made of pickets, each not less than six inches in circumference and not more than six inches apart, and shall be driven in the ground not less than ten inches, all well secured at the tops with slats or caps.

4th. Ditch and pole fences shall be made of a ditch not less than four feet wide on top and three feet deep; embankments thrown up on the inside of the ditch, with substantial posts set in the embankment not more than eight feet apart, and a plank, pole, rail or slat, securely fastened to said posts at least five feet from the bottom of the ditch.

5th. Pole fences shall be four and one-half feet high, with stakes not less than three inches in diameter, set in the ground eighteen inches, seven feet apart, and with not less than six horizontal poles well secured to stakes; if six feet apart, five horizontal poles; if three or four feet, four poles; if two feet, three poles, and the stakes need not be more than two inches in diameter; if one foot apart, one pole, and the stakes need not be more than two inches in diameter. The above is a lawful fence so long as the poles are securely fastened and in a good state of preservation.

6th. Brush fences shall be four and one-half feet high and at least twelve inches wide, with stakes not less than two inches in diameter, set in the ground not less than eighteen inches, one on each side every third foot, tied together at the top, with one horizontal pole tied to the outside stake five feet from the ground. *Gen. Laws*, 3032.

SEC. 3. In Sonoma, Napa, El Dorado, Yuba and Marin, a lawful fence shall be:

1st. Post and rail fences, not less than four by six inches, set in the ground not less than two feet, with rails not less than three inches thick, placed not more than five inches apart for the first three feet and after that not more than eight inches apart, the fence to be not less than five feet high.

2d. Worm fences shall be five feet high, with additional stakes and riders; no greater space to intervene between the rails than in a post and rail fence.

3d. Post and slat fences shall be of the same height and with the same space between the slats; the posts to be not less than twelve inches in circumference and set not less than two feet in the ground; the slats not to be less than one and one-half inches thick and fastened with twelve-penny nails.

4th. Paling fence shall be of the same height, post of the same size, set in the ground the same depth and not more than ten feet apart.

5th. Ditch fence shall be four feet wide at top and three feet deep, with posts set in the embankment not over seven feet apart, with three slats not less than four inches wide and one and a half inches thick, all well fastened to the post. *Gen. Laws*, 3034.

SEC. 4. In Contra Costa, a fence is a lawful fence constructed of posts of reasonable size and strength, firmly set in the ground, not more than twelve feet apart if a rail or picket fence, and not more than eight feet if a plank fence, the rails or planks of reasonable size and strength, securely fastened to the posts to the height of four and a half feet and reasonably close. If a picket fence, the pickets of ordinary size and strength, strongly nailed to a rail above and one below, or driven into the ground and nailed to a rail above, reasonably close, and four and a half feet high. If a ditch fence, three and a half feet wide at the top, three feet deep, embankment on the inside of the inclosure, with a rail or plank or picket fence on the embankment to the height of three feet, or any other kind of fence equivalent in height, quality and strength, to the above kinds of fences. *Gen. Laws*, 3047.

SEC. 5. In San Bernardino, Colusa, Shasta, Tehama, Placer and Yuba, a lawful fence must, if built of stone, be four and one-half feet high; if rails, five and one-half feet high; if a post and rail fence or picket fence, it shall be constructed of posts of a reasonable size and strength, securely fastened to the posts, to the height of four and a half feet and reasonably close; if a picket fence, the pickets shall be strongly nailed to a rail above, reasonably close; if a ditch fence, the ditch to be at least two and a half feet deep and three feet wide at the top, the embankment to be either on the inside or outside of the inclosure, with a rail, board or picket, fence on the embankment to the height of three feet; or any other kind of fence equivalent in height, quality and strength, with the above kind of fences, is a lawful fence. *Gen. Laws*, 3050.

SEC. 6. When a fence has been erected by any person on the line of his land and the person owning the land adjoining thereto shall make or cause to be made, an inclosure on the opposite side of such fence so that such fence may answer the purpose of inclosing his ground also, such person shall pay the owner of such fence already erected one-half the value of so much thereof as serves as a partition fence between them. And if the party so inclosing shall neglect or refuse to pay the one-half, the land so inclosed shall become liable therefor, and the value of one-half of such fence shall become and remain a lien upon such land and shall draw interest at the rate of fifteen per cent. per annum until paid. Notice of such lien shall be filed in the office of the recorder of the county, as provided for mechanic's lien. The value of the fence at the time of the inclosure, with interest thereon, shall be the amount to which the builder is entitled. *Gen. Laws*, 3065.

SEC. 7. When it shall be necessary to build a partition fence, in order to protect the rights and interests of either of the adjoining occupants of land, the other or others, when notified of such fact, shall proceed to erect one-half of such partition fence—shall be erected as nearly as possible on the line of such land. And if, after six months' notice given, either party shall persist in refusing to erect such fence, the party giving the notice may proceed to erect

the entire fence and collect by law the one-half of the cost of such fence from the other party, and shall be entitled to a lien, as is provided for mechanics. *Gen. Laws*, 3037.

SEC. 8. All partition fences separating adjoining inclosures shall stand upon the line; if the owner of land, when building a fence, shall fail to do so, and when told to put the same on the line shall refuse, shall subject himself to one-half the cost of its removal and erection in the right place. *Gen. Laws*, 3038.

SEC. 9. The respective owners or lessees of lands which now are or hereafter may be inclosed with fences, shall keep up and maintain in good repair all partition fences between their own and the next adjoining inclosures, in equal shares, so long as both parties continue to occupy or improve the same. *Gen. Laws*, 3039. The last four sections do not apply to Butte, Amador, Tuolumne, San Diego, Nevada, Santa Barbara, San Bernardino, Colusa, Placer, Yuba, Trinity, Shasta, Klamath and Siskiyou.

SEC. 10. In the county of Contra Costa, where one of several persons owning lands adjoining to the other or others, which is inclosed by one fence, and either desires that a partition fence shall be built, he shall notify the other or others, and each shall build his proportion of the fence; on failure to do so within three months the party giving the notice may build the fence and collect from the other or others in default, by law, a just proportion of the cost of the fence together with costs of suit. Partition fences dividing lands shall be kept in repair by all the parties in interest. If either party fails to repair after five days' notice, the party giving the notice may repair and collect, by law, from the others a due proportion of the expense of repairs and costs of suit. A party having built or paid for a portion of a partition fence shall have the right to remove or exact pay for the same, when the fence shall cease to be a partition fence, by the removal of the outside inclosure. *Gen. Laws*, 3049.

SEC. 11. In San Bernardino, Colusa, Shasta, Tehama, Placer and Yuba counties, also in Tuolumne, provisions are similar to the preceding section.

CHAPTER L.

FERRIES AND TOLL-BRIDGES.

SECTION 1. At common law, no bridge or ferry could be erected so near another, bound by law to be provided with attendance, crafts, etc., as to draw away its profits. Upon the principle that such prohibition was for the public good, it was deemed unreasonable to suffer another to interfere with the profits of a bridge or ferry already established at considerable expense, perhaps, to the owner, as such interference was discouraging to undertakings of the sort, and consequently disadvantageous to the public. It is a decision of the common law, that if a ferry be erected so near an ancient ferry on the same stream as to draw away its custom, it is a nuisance to the owner of the old one, and in such a case an action lies by the owner of the first ferry against the owner of the new one, although the latter be a free ferry—for the injury to the plaintiff is not in the gains of the defendant but in drawing away the travel and thereby diminishing his tolls and the value of his franchise. In this state, no person has a right to establish a bridge or ferry so as to receive compensation for the same, unless authorized to do so by license issued by order of the board of supervisors. A free ferry or bridge may be established, provided there is no regularly-established bridge or ferry within one mile, immediately above or below. When, however, the board of supervisors has granted a license authorizing the erection of a public bridge or the establishment of a public ferry, then no other bridge or ferry, whether free or not, can be established within one mile immediately above or below it, unless in the opinion of the board of supervisors it is required by the public convenience. A free bridge or ferry, in the immediate vicinity of one regularly licensed, would be more injurious than the establishment of one regularly licensed to receive toll; as it would render the established crossing of no value whatever, while the other would only divide the profits. To say that the legislature only intended to prohibit licensed bridges and ferries and not

those which are free, would be to defeat the very object the legislature had in view. The fact that a free bridge or ferry so established, within one mile of one already licensed, issued certificates for one dollar by which the holder was entitled to passage for one month, does not constitute the holder a joint stockholder in the bridge or ferry. It is but another mode of payment and a mere evasion of the law, and subjects the owners to punishment for a misdemeanor under the statute. 6 *Cal.* 594–598.

SEC. 2. Before an action can be brought for interference with a ferry privilege—a vested right—the plaintiff must fully comply with the laws in relation thereto. 5 *Cal.* 47.

SEC. 3. The act of 1855 concerning ferries does not confer on the party an exclusive privilege, and he cannot maintain a civil action against any one who intrudes upon or injures the franchise; it confers only a limited right upon the party for the protection of which provision is made by indictment. Where a new right is introduced by statute, the party complaining of its violation is confined to the statutory remedy, so far as the courts of common law are concerned. If, however, the right existed at common law, the remedy provided by statute is merely cumulative. Ferry privileges are created by statute of this state, and no remedy by an action on the case is given—the former act providing a remedy by a civil action having been repealed. Courts of chancery, however, can give relief. 7 *Cal.* 129.

CHAPTER LI.

FORMER RECOVERY.

SECTION 1. To plead a former judgment in bar, it must appear not only that it was upon the same cause of action but between the same parties. 9 *Cal.* 130.

SEC. 2. A plea of a former suit pending is no bar to an action where the complaint in the former suit is so defective that a judgment rendered thereon would be a nullity. 9 *Cal.* 338.

SEC. 3. The judgment of a court of competent jurisdic-

tion directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties upon the same matter directly in question in another court. 7 *Cal.* 252.

SEC. 4. The former judgment of a court having jurisdiction over the subject matter and the parties, is a bar to a second suit upon the same cause of action between the same parties or their privies, and is conclusive, not only upon every question involved therein and thereby determined, but also as to every other matter which the parties might have litigated in the cause and which they might have decided. 25 *Cal.* 266.

SEC. 5. Where the *cause* and *object* of both actions are the same, a judgment in the prior bars the subsequent suit. When the cause or object of the actions are different, though the point in dispute is the same in both, the prior judgment is no bar to the subsequent action, but the verdict is matter of evidence to prove the point. Thus, when in an action of replevin, no damages were recovered for detention of the property, such damages might be recovered in a subsequent suit. 10 *Cal.* 521.

SEC. 6. An action brought by an agent, in his own name, for a trespass, in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. 12 *Cal.* 140. It would present a strange anomaly if a suit were brought by one and defeated on the ground that the property belonged to another, and then the other sued, if the last suit were defeated on the ground that the first suit concluded the last plaintiff. 12 *Cal.* 142.

SEC. 7. It is well settled that the doctrine of *res judicata* applies only to matters distinctly put in issue upon the record, and directly determined by the court or jury. It is not sufficient that the point in dispute was raised by the pleadings in a former action; it must have been judicially passed upon and determined, or the judgment in such action cannot be relied upon as a bar. In the present case we have no doubt that the breach of the warranty might have been relied upon, by way of recoupment, to mitigate the recovery in a former suit, but we are equally clear that

it was not available as a complete defense, for which purpose alone it seems to have been set up in the answer and relied upon at the trial. It is unnecessary to determine whether the answer was sufficient to entitle the plaintiffs to recoup the damages resulting from the breach of the contract; we are clearly of opinion that by the instruction of the court the whole matter was excluded from the consideration of the jury. They were told that the rights of the parties depended upon other considerations, of which alone they were permitted to inquire. That they did not consider any question in relation to the warranty and could not legally have done so under the instruction, we think does not admit of serious controversy. We see no error in the record and the judgment must therefore be affirmed. 15 *Cal.* 425, 426.

SEC. 8. The issues passed on in a former suit may be ascertained by an inspection of the judgment roll; and if that fails to disclose all the facts necessary to a complete determination of the question, a resort may be had to extrinsic evidence. The question whether a former judgment is erroneous is not material; for an erroneous judgment, until reversed, is as binding and conclusive upon parties and privies as one in which no error is found. 25 *Cal.* 266.

SEC. 9. In order to render the former judgment effectual as a bar, it must appear that the matters litigated were submitted on their merits and actually passed on by the court; for if the trial went off on a technical defect or because the cause of action had not yet accrued or because of the temporary disability of the plaintiff to sue, or the like, the judgment will be as bar to a future action. 25 *Cal.* 266.

SEC. 10. A judgment upon demurrer is not always a bar to a subsequent action. It is so only where it determines the whole merits of the case. Where the answer shows that the demurrer was to the validity of the contract which gave rise to the claim and this averment is found to be true as alleged, by the judge at *nisi prius* upon inspecting the record of the case, the judgment upon demurrer is a bar to the suit. 5 *Cal.* 428, 429.

CHAPTER LII.

FRAUD.

	SECS.		SECS.
DEFINITION	1	POSSESSION BY MORTGAGE	29–31
CONVEYANCES—LEASES	2– 4	TO HINDER AND DELAY CREDITORS	32–34
TRUSTS	5– 7	INTENT	35–36
AGREEMENTS NOT IN WRITING	8–15	"LANDS" AND "CONVEYANCE," DEFINED	37
REQUISITES OF SALE OF GOODS, ETC.	16–19	AS BETWEEN THE PARTIES	38–40
IMMEDIATE DELIVERY AND CONTINUED POSSESSION	20–28	PROOF OF	41–43

Definition.

SECTION 1. *Statute of Frauds.*—The name commonly given to the statute (29 *Car. II*, C. 3), entitled "An act for prevention of frauds and perjuries." Fraudulent conveyances received early attention; and the statutes 13 *Eliz.* (C. 5) and 27 *Eliz.* (C. 4), made perpetual by 29 *Eliz.* (C. 18), declared all conveyances made to defraud creditors, etc., to be void. These statutes have been generally adopted in the United States as the foundation of all the state statutes on the subject. The following is the statute of California. The decisions of the supreme court, in connection therewith, here given, will be sufficiently explanatory:

Conveyances—Leases.

SEC. 2. No estate or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering or declaring, the same or by his lawful agent thereunto authorized by writing. *Gen. Laws*, 3150.

SEC. 3. A sale of growing crops, the product of periodical planting and cultivation, does not come within the provisions of the statute of frauds relating to sales of an interest in real estate, and, therefore, though not in writing, is valid. 23 *Cal.* 65.

SEC. 4. A lease for two years executed by the lessees and by an agent of the lessors—but who had no *written authority* to do so—is within the sixth section of the statute of frauds, and therefore invalid. 2 *Cal.* 604.

Trusts.

SEC. 5. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Every contract for the leasing for a longer period than one year or for the sale of any lands or any interest in lands, shall be void, unless the contract or some note or memorandum thereof expressing the consideration be in writing, and be subscribed by the party by whom the lease or sale is to be made. Every instrument required to be subscribed by any person under the preceding section, may be subscribed by the agent of such party, lawfully authorized. Nothing contained in this chapter shall be construed to abridge the powers of courts to compel the specific performance of agreements in cases of part performance of such agreements. *Gen. Laws*, 3151–3154.

SEC. 6. All deeds of gifts, all conveyances and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors existing or subsequent of such person. *Gen. Laws*, 3155.

SEC. 7. Where the vendor of personal property acquired his title to the property in fraud of the creditors of his vendor, his vendee, for a valuable consideration and without notice of the original fraud, is not affected by the taint of his title. The title, although originally fraudulent, is cured by the subsequent conveyance to an innocent party. 12 *Cal.* 484.

Agreements not in Writing.

SEC. 8. In the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith:

1st. Every agreement that by the terms is not to be performed within one year from the making thereof.

2d. Every special promise to answer for the debt, default or miscarriage, of another.

3d. Every agreement, promise or undertaking, made upon consideration of marriage, except mutual promises to marry. *Gen. Laws*, 3156.

SEC. 9. The twelfth section of our statute of frauds is substantially borrowed from the fourth section of the English statutes of 29 *Charles II.* 12 *Cal.* 552.

SEC. 10. Where the consideration of a contract is expressed in writing, although fictitious, it satisfies the statute of frauds. If there be no consideration, that fact may be urged specially as a good ground of defense. 2 *Cal.* 462.

SEC. 11. There is no conclusion of fraud, springing from a want of a consideration in a deed which will enable a stranger to attack it; and although it is a circumstance, among others, from which fraud may be inferred, still the party must bring himself within the statute. 7 *Cal.* 139.

SEC. 12. By the statute of frauds, a promise to pay the debt of a third person must be in writing, though to be performed within one year. 2 *Cal.* 156.

SEC. 13. A parol promise to pay for the improvements upon land, is not within the statute of frauds. 2 *Cal.* 493.

SEC. 14. The general rule is thus stated: The terms "original" and "collateral" promise, though not used in the statute, are convenient enough to distinguish between the cases where the direct and leading object of the promise is to become the surety and guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own. The former, whether made before or after or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor. 9 *Cal.* 334. The interest which a promisor has in the performance of a contract by another,

or the benefit which he may derive thereby, cannot determine his liability. That liability arises from the character of the promise, and the interest in the principal contract or the benefit to be gained by its performance become matters of consideration only as they may serve to determine that character. 9 *Cal.* 335.

SEC. 15. The provision of the statute of frauds, which requires the promise to pay the debt of another to be in writing, expressing the consideration, does not apply to the promise of A to pay money he owes, by contract with B, to C. This is A's debt; the mere direction in which he pays it not altering the character of the contract from an original obligation. 12 *Cal.* 314.

Requisites of Sale of Goods, etc.

SEC. 16. Every contract for the sale of any goods, chattels or things in action, for the price of two hundred dollars or over, shall be void, unless:

1st. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith.

2d. Unless the buyer shall accept or receive part of such goods or the evidences, or some of them, of such things in action.

3d. Unless the buyer shall at the time pay some part of the purchase-money. *Gen. Laws*, 3157.

Part performance will take a case out of the statute of frauds. 2 *Cal.* 492.

SEC. 17. Whenever any goods shall be sold at auction and the auctioneer shall at the time of sale enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section. *Gen. Laws*, 3158.

SEC. 18. The memoranda required by the statute of frauds to be entered by auctioneers in their sale-books, are the substitutes for contracts reduced to writing and signed by the parties, and must be made at the very time of the

sale, or the vendee will not be bound by the contract: so *held* in a case where the sale at auction took place in the forenoon and the memorandum was not made by the auctioneer before the evening of the same day. A memorandum entered in the name of the person on whose account the sale was made but one hour after the sale, would not bind the vendor. The auctioneer ceases to be the mutual agent after the sale is closed. 1 *Cal.* 415, 416.

SEC. 19. A sale of land at auction, where no note or memorandum of sale is made by the auctioneer and no writing exists between the parties, is void by the statute of frauds. 6 *Cal.* 75.

Immediate Delivery and Continued Possession.

SEC. 20. Every sale made by a vendor of goods and chattels, in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vender or the creditors of the person making such assignment or subsequent purchasers in good faith. The term "creditors," as used in this section, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time while such goods and chattels shall remain in his possession or under his control. *Gen. Laws*, 3159, 3160.

SEC. 21. Delivery, within the statute of frauds, must be such as the nature of the case admits. Wine may be delivered by giving up the keys of the wine-cellar; and the consent of a party upon the spot is sufficient possession of a column of granite, which by its weight and magnitude is not susceptible of any other delivery, and when the declared intention is to take possession. A bill of sale of timber and materials of great bulk, or marking the timber, has been held such a delivery and change of possession as the subject-matter reasonably admitted. Taking a bill of parcels and an order from the vendor on the store-keeper for the goods, and going and marking them with the initials of the vendee's name; taking a bill of parcels and an order

on the warehouseman and paying the price; the communication of the vendor's order on a wharfinger or warehouseman, for delivery and assented to by him; the change of mark on bales of goods in a warehouse by direction of the parties; taking the vendee within sight of ponderous articles, such as logs lying within a boom and showing them to him; selecting and marking of sheep by the vendee—have severally been held to be sufficient delivery.

SEC. 22. The rule under our statute as to the delivery of possession of mortgaged personal property was not intended to be more strict than that held by the English and United States courts as the proper construction of the statute of frauds. *Ch.* 29, Sec. 11. The words of the rule are not to receive an unreasonable construction. Although delivery be requisite in cases of sales, yet what will constitute a delivery must depend, in some measure, upon the character of the article sold and the peculiar circumstances of the case. Mr. Parsons on *Contracts* (vol. 2, p. 328) says: "It may be said, in general, that a delivery must be a transfer of possession and control made by the seller with the purpose and effect of putting the goods out of his hands. This is a sufficient delivery whatever its form. Hence it may be constructive, as by delivering the key of a warehouse or making an entry in the books of the warehouse-keeper, or delivery with indorsement of a bill of lading or even of a receipt, or without even such when the goods are bulky and difficult of access, as a quantity of timber floating in a boom, or a mass of granite or a large stack of hay." *Kent's Com.* (Vol. 4, 500) holds that the consent of the parties upon the spot is a sufficient possession of a volume of granite, which by its weight and magnitude was not susceptible of any other delivery and was taken by the eyes and declared intention. 14 *Cal.* 386, 387.

SEC. 23. Hay cut on land in possession of B. lies in three fields of about one hundred and fifty acres, in swaths, cocks, winrows and stacks. Plaintiffs mowed it and boarded with B. B. mortgages the hay to plaintiffs for work and they cease to board with B., whose dwelling is separated from these fields by a fence. Plaintiffs proceed to gather and stack the hay until the levy of an execution on it eight days

afterwards by defendant as B.'s property. The delivery was sufficient.

SEC. 24. The continued change of possession required by the statute of frauds, after a sale of goods and chattels, in order to validate the sale must be actual and not constructive. 4 *Cal.* 290.

SEC. 25. The statute of frauds requires the sale to be accompanied by an immediate delivery, and to be followed by an actual and continued possession of the property sold. The language of the statute is exceedingly strong and the intention manifest. The change of possession from the vendor to the vendee must not only be actual but also continued. 8 *Cal.* 517.

SEC. 26. The growing crop, while growing and until ready for the harvest, is also unaffected by the fifteenth section of the statute in relation to the sale of goods and chattels in the possession and under the control of the vendor. A growing crop, until ready for the harvest, cannot by itself become the object of delivery, and can only be delivered into the possession of the vendee by delivering to him the possession of the land also of which it is a part. We do not consider that chattels thus situated fall within the rule prescribed by the statute in relation to the immediate delivery and actual and continued change of possession of goods and chattels in the possession and under the control of the vendor, at least until nature has prepared them for delivery to the reaper. To so construe the statute would make it an absolute interdiction upon the sale of growing crops, unless the vendor is willing to abandon the possession of his farm to the vendee at the same time. Growing crops, in respect to delivery, are not unlike ships and cargoes at sea, of which delivery cannot be made until they reach port. *Davis* vs. *McDonald*, 37 Cal. 640.

SEC. 27. Delivery of possession of personal property may be either actual or constructive; and actual delivery is contemplated by the statute, unless such delivery be impossible or extremely inconvenient, in which case a symbolical delivery is sufficient. *Doak* vs. *Brubaker*, 1 Nev. 218.

SEC. 28. Where the property is in the possession of a

bailee also, actual delivery is not necessary; the only delivery which could be made would be to give an order for it or deliver the receipt or obtain the recognition of the bailee, but when in the possession of an agent or servant a different rule prevails. 1 *Nev.* 218.

Possession of Mortgagee.

SEC. 29. No mortgage of personal property hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee: *provided*, that a mortgage upon growing crops, executed, acknowledged and recorded, like mortgages upon real estate, shall be valid as against third parties without such delivery of possession, but the lien of such mortgage shall cease as against subsequent purchasers, unless possession of such crops when harvested be delivered to the mortgagee as required in other cases of mortgage of personal property. *Gen. Laws*, 3161.

SEC. 30. A mortgage stipulating for the enjoyment of the possession of personal property by the mortgagors until breach of the condition, is invalid under the statute of frauds as to all persons except the parties to it. If the mortgagee took immediate and actual possession of the property in the absence of any contract concurrent or subsequent to the mortgage, conferring any greater authority than that contained in the mortgage, he cannot claim by virtue of such possession, because the covenants of the mortgage show that he was not entitled to such possession. Under such a mortgage the mortgagee cannot claim the right of possession as against a sheriff who has attached the property as that of the mortgagors. 5 *Cal.* 322.

SEC. 31. Nothing contained in the twentieth and twenty-second sections shall be construed to apply to contracts of bottomry, respondentia, nor assignments or hypothecations of vessels or goods at sea, or in foreign states or without this state: *provided*, the assignee or mortgagee shall take possession of such vessel or goods as soon as may be after the arrival thereof within this state. Every instrument required by any of the provisions of this act to be subscribed

by any party may be subscribed by the lawful agent of such party. *Gen. Laws*, 3162, 3163.

Hinder and Delay Creditors.

SEC. 32. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things, in action or upon the rents and profits thereof, made with the intent to hinder, delay or defraud, creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suits commenced, decree or judgment suffered, with the like intent as against the persons hindered, delayed or defrauded, shall be void. *Gen. Laws*, 3164.

SEC. 33. The statute 13 *Eliz.* (Ch. 5) is the foundation of the acts on the subject of conveyances to hinder, delay or defraud, creditors in the several states, and has been substantially incorporated into our law. This statute declares all gifts, conveyances and alienations, of real or personal estate, whereby creditors may be delayed or defrauded, void as against such creditors; but judicial interpretation has determined that creditors at the time of the transaction are, alone, intended by the statute. Thus, a settlement made after marriage, and therefore considered voluntary, will be maintained against subsequent creditors: *provided*, the settler was not indebted at the time he made it. This general rule must, however, be qualified so as to exclude cases of positive fraud. It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent; if he do so with a view to his being indebted at a future time, it is equally a fraud and ought to be set aside. As against subsequent creditors, then, a conveyance even if voluntary is not void, unless fraudulent in fact: that is, unless made with the view to future debts; though evidence of an intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors. 13 *Cal.* 71, 72.

SEC. 34. Every grant or assignment of any existing trust

in land, goods or things in action, unless the same shall be in writing, subscribed by the person making the same or by his agent lawfully authorized, shall be void. Every conveyance, charge, instrument or proceeding, declared to be void by the provisions of this act, as against creditors or purchasers, shall be equally void as against the heirs, successors, personal representatives or assigns, of such creditors or purchasers. The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact and not of law, nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration. The provisions of this act shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor. *Gen. Laws*, 3165–3168.

Intent.

SEC. 35. Fraud may be committed when there is no fraudulent intention actually existing in the mind of the party at the time the act was done. In other words, the law irresistibly draws the conclusion of fraud from certain established facts, without any further inquiry into the real motives of the party. 7 *Cal.* 355.

SEC. 36. To impeach a sale upon the ground of fraud, the fraudulent intent of both the seller and the purchaser must be shown. The declarations, as well as the conduct of the seller, before the sale, are competent testimony to show this fraudulent intent on his part. 8 *Cal.* 112, 113.

"Lands" and "Conveyances," Defined.

SEC. 37. The term "lands," as used in this act, shall be construed as coextensive in meaning with lands, tenements and hereditaments, and the terms "estate" and "interest" in lands, shall be construed to embrace every estate and interest, present and future, vested and contingent, in lands as above defined. *Gen. Laws*, 3169. The term "conveyance," as used in this act, shall be construed to embrace

every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned or surrendered. *Gen. Laws*, 3170.

As between the Parties.

SEC. 38. Crops, growing upon land, are not goods and chattels within the meaning of the statute of frauds, and will pass by deed or conveyance from the very necessity of the case, as they are not susceptible of manual delivery until harvested and reduced to actual possession. 6 *Cal.* 664.

SEC. 39. A sale of property, however fraudulent as to creditors, is good as between the parties to the sale. 5 *Cal.* 368.

SEC. 40. In a case between two purchasers of the same property from the same fraudulent vendor, where the only question regards the person who must sustain the loss, if both purchasers were *equally* in fault or *equally* innocent, then the *first* purchaser is entitled to the property. 8 *Cal.* 560.

Proof of.

SEC. 41. It is never to be presumed that a party has committed a fraud, and where fraud is alleged for the purpose of depriving him of a right, the facts sustaining it must be clearly made out. 21 *Cal.* 503.

SEC. 42. What the law has tainted with fraud, in its inception, can lose none of its concomitants by passing through a multiplicity of hands. 6 *Cal.* 140.

SEC. 43. An action founded upon a fraud cannot be maintained by a party to the fraud. 26 *Cal.* 310.

CHAPTER LIII.

CONFUSION OF GOODS.

SECTION 1. If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value the aggregate of both, and through the fault of the person mixing them the other party cannot tell what was the value of his property, he must have the whole. 9 *Cal.* 660.

SEC. 2. But it will be observed that when articles of different values are mixed, producing a third value, the innocent party is only allowed the whole in case he cannot tell the original value of his property. Even in case of such a mixture, if the original value of the property mixed can be ascertained, the party can only claim that value, except the mixture be willfully made with intent to injure, or from gross negligence. 9 *Cal.* 660.

SEC. 3. Where an agent confounds his principal's property with his own, it devolves upon the agent to distinguish his own portion, otherwise the principal may take the whole. 9 *Cal.* 661.

SEC. 4. A party is not compelled to pay for improvements that he has never authorized and which originated in tort. If every man ought to have the fruits of his own labor, that principle can apply only to a case where the labor has been lawfully applied, and the other party has voluntarily accepted those fruits, without reference to any exercise of his own rights. For, if in order to avail himself of his own vested rights and use his own property it be necessary to use the improvements wrongfully made by another, it would be strange to hold that a wrong should prevail against a lawful exercise of the right of property. In case of a tortious confusion of goods, the common law gives the sole property to the other party. 7 *Cal.* 9.

CHAPTER LIV.

INJURIES TO PERSON AND CHARACTER—MALICIOUS PROSECUTION.

SECTION 1. *Injuries to Person and Character.*—Cases from New York cited to show that, though there, as here, the statute provides, a claim for injuries to the person shall not be joined with a claim for injuries to character, yet if the facts of the whole case or transaction embrace an injury to the person and also an injury to the character, then plaintiff may recover in one action for the compound injury. *Jones* vs. *Steamship Cortez*, 17 Cal. 487.

SEC. 2. In order that a party in an action for malicious prosecution may avail himself of the defense of advice of counsel, he must show that such advice was given upon a full and fair statement of the facts within his knowledge. 7 *Cal.* 257, 258.

CHAPTER LV.

INJURY TO PERSONAL PROPERTY.

SECTION 1. Personal property is divided into two kinds: Property in possession and property in action, and the owner may have as absolute a property in, and be as well entitled to, such thing in action as to things in possession. 7 *Cal.* 203.

SEC. 2. The general rule is, that every man may do as he chooses with his own property, provided he does not injure another's. But there is another rule as well established, which is, that a man must so use his own property as not to injure his neighbor's. This last rule, however, does not make a man responsible for every injury which may arise to another from the use which the first may make of his property. It would be an intolerable hardship to hold a man responsible for unavoidable accidents which may occur to his property by fires or casualties or acts beyond his control, though others are likewise injured. The degree of negligence which will subject the owner to

liability to third persons in such cases has been settled by repeated decisions. 10 *Cal.* 417.

SEC. 3. The degree of care which a party who constructs a dam across a stream of water is bound to use, is in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods, for if the stream is occasionally subject to great freshets, those must likewise be guarded against; and the measure of care required in such cases is that which a discreet person would use if the whole risk were his own. In a case where the plaintiff gave evidence that the defendant was the possessor of a saw mill and dam above the plaintiff's works and, by means of the dam, had raised a large body of water, about a mile in length and varying in width from a few rods to half a mile; and that the dam gave way and let down the whole body of water upon the plaintiff's works below and which swept away and destroyed his property to a large amount; and at the time the dam gave way there had been no unusual fall of rain—the court held that the defendant was subject to the maxim: *Sic utere tuo ut alienum non lædas;* and, to comply with the requisition of the common law, it was the duty of the defendant to have used *ordinary* care and diligence in making repairs to his dam or in drawing off the water from his pond, to prevent injuries to the plaintiff's furnace. If the defendant did not use this care and diligence, he was guilty of negligence and liable for consequential damages, but he was not liable for *inevitable accident.* And if the dam were to break without any negligence or through inevitable accident, it would be the duty of the party to repair it and stop the injury as soon as practicable. 10 *Cal.* 417, 418.

SEC. 4. This is an action for injuries to a garden, occasioned by the breaking of a reservoir. On the trial of the case the court instructed the jury, in substance, that to entitle the plaintiff to recover it must appear that the breaking of the reservoir resulted from the gross negligence of the defendants. This instruction, considered by itself, was no doubt erroneous, but the court proceeded to explain what was meant by gross negligence in such a manner that

the jury could not have been misled. They were told that the defendants must have taken the same care of their reservoir and the water in it, as they would have done, being prudent men, had the garden of the plaintiff been their property, and that otherwise they had been guilty of gross negligence, and were liable in damages. We understand the law to be well settled that the measure of care required in such cases is that which a discreet person would use if the whole risk were his own. The conduct of the defendant must be viewed with reference to the caution which a prudent man would, under the given circumstances, have observed. This is the rule laid down in *Hoffman* vs. *Tuolumne County Water Company* (7 Cal. 413), and in *Wolf* vs. *St. Louis Water Company* (7 Cal. 541). 17 *Cal.* 98.

SEC. 5. A vessel in the harbor of San Francisco, moored in the usual track of bay and river steamers, should set a light and keep a watch in a dark night, or she cannot recover damages for an injury sustained by being run into by a steamer, where there was neither gross negligence nor intentional wrong on the part of the steamer. The want of such watch and light is to be deemed negligence *per se*, and the court should instruct the jury in such case to find a verdict in favor of the defendant. 1 *Cal.* 459.

SEC. 6. A plaintiff suing for an injury from collision must be faultless. But the neglect of the injured vessel to rig in her jib-boom, as required by the port regulations, will not bar the action, if it be shown that such neglect did not cause the collision, although it may have increased the injury. 2 *Cal.* 24.

SEC. 7. When a vessel is properly in charge of a licensed pilot, the owner is not liable for damages which may ensue from the negligence or misconduct of the pilot. Under our statute, however, the responsibility of taking a position or berth, for a vessel in port, rests upon the master of the vessel or upon the harbor master, and therefore the owner is not exempt from liability for injuries committed by taking an improper berth, although such berth may have been selected by the pilot who brought the vessel into port. 2 *Cal.* 24.

SEC. 8. In an action for an injury to the plaintiff's cart

or coach, or horses, by negligently driving against them, the plaintiff's own driver or coachman is not a competent witness for him, without a release. And there is, in principle, no difference between the case where the master is plaintiff and where he is defendant. The negligence of the servant in either case defeats the master. 7 *Cal.* 256.

SEC. 9. A party in the actual possession of cattle at the time of the injury is entitled to maintain an action for any injury to them while in his possession. 9 *Cal.* 58.

SEC. 10. A railroad company is not liable for damages caused by fire from sparks from their engine, unless negligence is proven by the plaintiff. 7 *Cal.* 340.

SEC. 11. A municipal corporation is not liable for the destruction of a building, in pursuance of the directions of its officers, where no statute exists creating such liability. So *held*, in a case where the building of the plaintiff was blown up by the directions of the alcalde and several members of the ayuntamiento of San Francisco, during a conflagration, for the purpose of staying its progress, and where it appeared that the destruction of the building by fire was not inevitable. 1 *Cal.* 355.

CHAPTER LVI.

INJURIES TO THE PERSON.

SECTION 1. On this subject the case of *Kramer* vs. *Market-street Railroad Company* is explicit. The points decided are:

1st. That a civil action for damages for the death of a person, *per se*, cannot be maintained by any one at common law.

2d. That in this state, a civil action for damages for the death of a person can be maintained only by the administrator or executor of the deceased.

An act of the legislature, passed April 26th, 1862, provides for compensation for causing death by wrongful act, neglect or default. The eleventh section of the practice act—which provides that "the father, or in case of his death or

desertion of his family the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward"—does not create a right of action where none existed before, but merely designates the persons by whom an action for causes therein mentioned, which then existed or might thereafter be created by statute, should be brought. At the time the practice act was passed, the death of a person constituted no cause of action, and the eleventh section of that act, so far as it designates the parties by whom an action for the death of a person may be brought, is repealed by the act of 1862, which provides that "every such action shall be brought by and in the names of the personal representatives of such deceased person." The words "personal representatives," as used in that act, mean the administrator or executor of the deceased, and not the heir or next of kin. Here the plaintiff sues as father [of the child killed] or sole heir of the deceased person.

SEC. 2. Where in an action brought by a passenger of a stage-coach against the owners thereof for injuries sustained by reason of the upsetting of the coach, it appears that the coach at the time of the accident was driven by the servant or agent of the owner, the rule in such cases is that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him. 7 *Cal.* 120.

SEC. 3. The rule of law regulating the obligation between master and servant or contractor and workman, is that the latter is liable for all accidents occurring in the course of the employment which are not induced by the carelessness or improper conduct of the employer. In other words, the master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not, he will be responsible for the damages. 6 *Cal.* 210.

SEC. 4. If a party be employed to do a lawful act, and in doing it he commit a public nuisance, his employer is not liable. Thus, where the defendants contracted with A to fill in the earth over a drain which was constructed for them across a portion of the highway, from their house to the common sewer, and A having filled the drain left the earth so heaped up above the level of the highway as to

constitute a public nuisance, in consequence of which the plaintiff in driving along the road sustained personal injury, for which he brought his action; and a few days previous to the accident, and before the completion of the work, one of the defendants had seen the earth heaped up on a portion of the drain, but there was no evidence that either of the defendants had interfered with or exercised any control over the work, the court held that there was no evidence to go to the jury of the defendants' liability. 8 *Cal.* 492.

SEC. 5. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned. 8 *Cal.* 491.

SEC. 6. Where a man is employed in doing a job or piece of work with his own means and his own men, and employs others to help him or to execute the work for him and under his control, he is the superior, who is responsible for their conduct, no matter whom he is doing the work for. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded. 8 *Cal.* 492, 493.

SEC. 7. The doctrine is, that a person who undertakes the erection of a building or other work for his own benefit, is not responsible for injuries to third persons occasioned by the negligence of a person or his servant, who is actually engaged in executing the whole work under an independent employment or a general contract for that purpose. 8 *Cal.* 493.

SEC. 8. Thus, where a city had entered into a contract with F, to grade a certain road, and F made a contract with R to do all the blasting of rocks required, and in blasting several fragments of rock were thrown into the house of the plaintiff, producing injury to his family and property; it

was held, that the contractor, F, was the agent or servant of the corporation, and that the city was not, in consequence, liable. 8 *Cal.* 493.

SEC. 9. As a general rule, no one can be held responsible as principal who has not the right to choose the agent from whose act the injury follows. 8 *Cal.* 493.

SEC. 10. The distinction as to the liability of a party, where he engages a contractor to erect structures on his own premises, and when he engages such contractor to erect them on the premises of another, does not rest on any just principle. If the enterprise undertaken be a lawful one, and be intrusted to competent and skillful architects, there is no just reason why liability should attach to the projector for injuries occurring in its progress, any more if such enterprise be executed on his own land than if executed elsewhere. If a man, wishing to build a house for his own use, upon his own premises, lets it out by contract to an architect, who is to provide all materials, and deliver it completed, upon no just principle should his liability be greater than if he undertook the building of a similar house upon his neighbor's property and let it out by contract in the same way. If the structure amount to a nuisance—if the injury complained of arises, not from its negligent or unskillful construction, but from the fact that it is constructed at all—then liability would attach, whether the erection be made under his own supervision and control or let out by contract to others. To illustrate this position—if the owner of land erect a dam, or permit a dam to be erected, across a stream running through his property, by which his neighbor's land is flooded, he is liable for damages, for the injury results, not from the manner in which the dam is erected, but from the fact that it is erected at all. He has used, or permitted his property to be used, to the injury of others, and must be responsible. But if no injury follows from the dam itself, and its construction is let out by contract, there is no reason why the owner should be responsible for injuries arising from the negligence or unskillfulness of the contractors during the progress of the work, from the fact that it is a structure upon his own land, if such liability would not attach to him if the structure were on the land of another. 8 *Cal.* 496, 497.

SEC. 11. Parties for whom work contracted for is undertaken must see to it before acceptance that the work, as to strength and durability and all other particulars necessary to the safety of the property and persons of the third parties, is subjected to proper tests and that it is sufficient. By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties the liability of the contractors has ceased and their own commenced. 8 *Cal.* 498.

SEC. 12. Where parties employed architects, reputed to be skilled in their profession, to construct at a designated point on a creek, a dam or embankment, of certain specified dimensions, capable of resisting all floods and freshets of the stream for a period of two years, and to deliver it completed by a given time, and before the embankment was completed it was broken by a sudden freshet, and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs, with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs having brought suit to recover the damage sustained by them against the employers and contractors: *Held* that the latter alone were liable. 8 *Cal.* 469.

SEC. 13. A county is not liable for damages for injuries sustained by individuals, caused by a road overseer placing the abutment of a bridge in the bed of a stream in such a manner as to cause the waters of the stream to flow out of their usual channel and wash away land or the improvements thereon. The relation between a county and its road overseer bears no resemblance to that of master and servant nor to that of employer and employé. If an abutment to a bridge is wrongfully built in the channel of a stream the remedy, if any exists, is against him by whom the injury was committed. 25 *Cal.* 313.

SEC. 14. Intoxication of the plaintiff is no defense to an action for damages for injuries caused by falling through an uncovered hole in the sidewalk of a public street. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the

plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one and much more in need of it. 5 *Cal.* 461.

SEC. 15. Vindictive damages may be given in a civil action for a personal injury though the act be punishable by a criminal prosecution. 2 *Cal.* 54.

SEC. 16. In an action on the case where the injury of which plaintiff complains has resulted from the negligence of both parties without any intentional wrong on the part of the defendants, the action cannot be maintained. 1 *Cal.* 367.

CHAPTER LVII.

INSOLVENT.

SECTION 1. Every insolvent debtor may be discharged from his debts as hereinafter provided, upon executing an assignment of all his property, real, personal or mixed, for the benefit of all his creditors, and upon compliance with the several provisions of this act: *provided*, said assignment be made *bona fide* and without fraud. The district court only shall have original jurisdiction in the subject-matter herein contained.* *Gen. Laws*, 3810.

SEC. 2. The county court shall have original civil jurisdiction: 1st. Of actions of forcible entry and detainer. 2d. Of proceedings in cases of insolvency. 3d. Of actions to prevent or abate a nuisance. 4th. Of all such special cases and proceedings as are not otherwise provided for. *Gen. Laws*, 1262.

SEC. 3. A discharge under the insolvent act, to be a bar to actions in indebtedness mentioned in the petitioner's schedule, must be in strict conformity with the various provisions of the law, otherwise it is void. 8 *Cal.* 44.

SEC. 4. A joint application of two partners for the benefit of the insolvent act is void, there being no authority for such applications in the act. A schedule attached to such a petition showing a surrender of all the joint property of

* The county courts have now original jurisdiction in insolvent cases.

the partners is not a compliance with the act which requires a surrender of *all* the property of the insolvent. 8 *Cal.* 44.

SEC. 5. An assignment of property to a creditor, to be sold at public auction and the proceeds to be applied: 1st, in payment of the claim of such creditor; and 2d, the residue to be distributed *pro rata* among the creditors of such debtor, is not in contravention of the statute which prohibits assignments by insolvent debtors for the benefit of creditors. If such creditor were insolvent at the time of the assignment, the party contesting the validity of the assignment should affirmatively show such fact. The insolvency could not be presumed from the language of the assignment. 12 *Cal.* 245.

SEC. 6. There is no rule of law which prevents a debtor, in insolvent circumstances, from the application of his property to the payment of one debt rather than another. 10 *Cal.* 494.

SEC. 7. When issuing the order for the meeting of creditors, the judge shall order that all proceedings against the debtor be stayed: *provided*, however, that the said stay of proceedings shall not prevent the judge who shall have granted it from appointing a receiver to take possession of all property of the debtor for the benefit of all his creditors, if one or more of his creditors, his agent or attorney in fact, shall apply for such appointment and swear that he has reason to believe, and does believe, that the debtor may avail himself of the stay of proceedings and keep his property from his creditors, if no cause sufficient, in the judgment of the court, shall have been shown why the debtor should not have the benefit of this act, and shall produce satisfactory proof of the facts on which his affidavit is founded. *Gen. Laws*, 3818.

SEC. 8. After a petition and schedule in insolvency are filed, the control and dominion of the insolvent's property are transferred to the court, and a creditor cannot, after such filing, certainly not after the order staying proceedings, seize the property. The order operates by its own force from its date, and no notice need be given of it to a sheriff with a writ against the insolvent. 14 *Cal.* 47.

SEC. 9. If the accusation of fraud brought against the debtor is declared to be ill-founded or if there be no opposition to the surrender of his property, and provided said surrender has been made according to the provisions of this act, said debtor shall be released and fully discharged from any and all debts until then contracted and contracted after the passage of this act and from every judicial proceeding relative to the same: *provided*, always, that the release and discharge authorized by this section shall not apply to debts and liabilities not mentioned and set forth in the schedule, unless the insolvent shall declare in his petition that it is his desire to be discharged from all his debts and liabilities, and that he has described them according to the best of his knowledge and recollection; in which case the discharge and release authorized by this section shall embrace all his debts and liabilities, notwithstanding they may have been imperfectly described or not described at all. *Gen. Laws*, 3833.

SEC. 10. An insolvent's discharge, under the statute, must be by the judgment of the court and in the same county in which the proceeding was instituted. Therefore, a discharge made at chambers by the district judge in the same district but in another county from that in which the proceeding was instituted, is no defense to an action against the insolvent. 6 *Cal.* 288.

SEC. 11. Whenever an insolvent debtor has had the benefit of this act, if thereafter at any time it is made to appear that he has concealed any part of his property or estate, or given a false schedule or committed any fraud under the provisions of this act, it is hereby declared that he has forfeited all benefit and advantage which he would otherwise have had by the virtue of this act, and he cannot avail himself of any of its provisions in bar to any claim that may be instituted against him. *Gen. Laws*, 3841.

SEC. 12. A decree discharging an insolvent debtor from his debts will not afford him any protection in bar of an action brought against him for debts contracted prior to such decree, if it is made to appear that he has concealed any part of his property, or given a false schedule or committed any fraud in procuring such discharge. 26 *Cal.* 279.

SEC. 13. From and after the surrender of the property of the insolvent debtor, all property of such insolvent shall be fully vested in his assignee or assignees, for the benefit of his creditors, and shall not be liable to be seized, attached, taken or levied on, by virtue of any execution issued against the property of said insolvent, and the assignees who may be appointed shall take possession of and be entitled to claim and recover all the said property, and to administer and sell the same as herein provided. *Gen. Laws*, 3843.

SEC. 14. The debt of an insolvent bankrupt is due in conscience notwithstanding his discharge, and is a sufficient consideration to support a subsequent express promise to pay. A verbal promise is sufficient at common law, and there is nothing in our statutes which changes the rule. 8 *Cal.* 85.

CHAPTER LVIII.

INTEREST.

	SECS.		SECS.
WHAT IS	1- 3	WHEN RECOVERABLE	8- 9
ACT TO REGULATE	4	AMOUNT OF, FOR WHICH JUDGMENT SHOULD BE RENDERED	10-11
FOLLOWS CONTRACT	5	COMPUTATION OF	12-13
WHO LIABLE FOR	6		
COMPOUND INTEREST	7		

What is.

SECTION 1. The only damages which the law allows for the detention of money under its process is the legal interest. The rule of damages in such cases, like the one which obtains in actions upon promissory notes, is a fixed and arbitrary one. The actual loss occasioned may be much greater than the interest, but the consequences beyond that the law does not inquire into. It would indeed often be impossible to determine the actual damages resulting from the detention of money; the party entitled to it may in consequence have been compelled to borrow on ruinous rates of interest; he may have become embarrassed in his business operations, ruined in credit and perhaps driven into

insolvency; but of these possible consequences the courts cannot take notice. The legal interest in such cases is the only measure which can be followed with certainty and, as a general rule, with safety. 12 *Cal.* 111.

SEC. 2. The law does not tolerate the payment of more than legal interest upon money, except when there is an express written agreement, and a higher rate of interest cannot therefore be proved as a measure of damages. 7 *Cal.* 148.

SEC. 3. Though interest is, as a general rule, not recoverable except by virtue of statutory regulations, a small rate may be allowed in some cases by way of damages: so *held*, where a referee, to whom a cause had been referred by consent of parties, had allowed the plaintiff interest at the rate of six per cent. per annum on the balance of an account found due to him. 1 *Cal.* 422.

Act to Regulate.

SEC. 4. The act to regulate interest on money is in derogation of the common law and must be strictly construed. This rule of construction, applied to the language of the second section, would confine its provisions to contracts *fixing the rate of interest*. According to the common acceptation, the expression, "rate of interest," has reference to the percentage or amount of interest, and not to the manner of computing. Rate is the price or amount stated or fixed on anything. That it was used in this sense is evident from the fact that it was thought necessary that direct authority for the compounding of interest by contract should be given in a separate section of the act. 11 *Cal.* 19.

Follows Contract.

SEC. 5. Interest follows a contract, according to the law in existence at the time and place of the contract or of the performance of it. A subsequent change in the legal rate of interest does not affect the contract. It is error to charge six per cent. interest on a contract made before the passage of our statute as to interest, up to the date of the statute, and ten per cent. afterward. 14 *Cal.* 171.

Who Liable for.

SEC. 6. Where an administrator rejects a legal claim against the estate, and the claimant afterwards sues and recovers judgment therefor, he is entitled to interest from the time of presenting his claim to the administrator. 18 *Cal.* 376.

SEC. 7. Interest upon interest already due cannot be allowed, except in pursuance of a written engagement of the parties. 11 *Cal.* 316.

When Recoverable.

SEC. 8. Where the account presented to an administrator for allowance contains no item for interest, and the face of the paper does not show that interest results necessarily from the facts stated as constituting the claim, interest is not recoverable. 14 *Cal.* 171.

SEC. 9. No judgments at common law carry interest. 2 *Cal.* 100.

Amount for which Judgment should be Rendered.

SEC. 10. In entering a judgment, the correct rule is to add the interest due on the notes up to the time of the judgment to the principal and enter the judgment for the gross amount, and such judgment is then to bear the same interest as the notes, until paid. The theory of the law is not that the party recovers the particular note or chose in action, as is commonly imagined, but that he recovers damages for the non-performance of the contract; and in case of failure to pay money due, it has always been held that the true measure of damages was the amount of money owing and the interest which was agreed upon. Thus the judgment being ascertained, the statute steps in and regulates whether it shall bear interest and at what rate. 5 *Cal.* 417.

SEC. 11. Interest upon a note should be calculated at the rate expressed therein from its date to the date of the judgment, and then added to the principal. The amount thus found due makes up the true amount for which judgment should be rendered. 11 *Cal.* 316.

Computation of.

SEC. 12. Upon a money demand bearing interest, on which have been made partial payments after maturity, the proper method of computing interest, is to apply the payment in the first place to the discharge of the interest then due; if the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal, until the period when the payments, taken together, exceed the interest due. But where an account has been stated by the plaintiff, charging interest both on the debt and the payments, and rendered to the defendant, and no objection made thereto within a reasonable time, it is the same as an agreement that the interest should be computed accordingly. 3 *Cal.* 233.

SEC. 13. Where the dealings of the parties extended through a period of more than two years, during which time three or four accounts were rendered by plaintiffs to defendants showing balances, in all of which accounts and throughout the whole of which time the parties pursued the same mode of computing interest, this mode was binding upon them. 3 *Cal.* 235.

CHAPTER LIX.

INSTRUCTIONS.

SECTION 1. An "instruction" is an exposition by a court to the jury of those principles of law which the latter are bound to apply in order to render such a verdict as will, in the state of the facts proved at the trial to exist, establish the rights of the parties to the suit. The essential idea of an "instruction" is that it is authoritative as an exposition of the law which the jury are bound by their oath and by moral obligations to obey. 31 *Barb.* (N. Y.) 566.

SEC. 2. An instruction should be a clear and explicit statement of the law applicable to the condition of the facts, and may be accompanied by such comments on the evidence as are necessary to show its application, and may, if carefully done, include an opinion on the weight of evidence, but should not by any form of expression or intendment decide the facts, unless it be in the entire absence of opposing proof. 7 *Wend.* 160. Erroneous instructions in matters of law which might have influenced the jury in forming a verdict are a cause for a new trial, even on hypothetical questions, on which no opinion can be required to be given, but this rule will not apply when the instructions could not have prejudiced the cause. 11 *Wheat.* 59; 6 *Cal.* 264. The above definition and rules are deducible from the laws and decisions which follow:

SEC. 3. Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law. *Const. Cal.* Art. IV, Sec. 17.

SEC. 4. In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict; and if it state the testimony of the case, it shall also inform the jury that they are the exclusive judges of all questions of fact. The court shall furnish to either party at the time, upon request, a statement in writing of the points of law contained in the charge, or shall sign at the time a statement of such points prepared and submitted by the counsel of either party. *Pr. Act*, 165.

SEC. 5. Instructions should conform to the pleadings and the facts. Instructions in civil and criminal cases should be drawn with reference to the case as made by the evidence. *People* vs. *Roberts*, 6 Cal. 214.

SEC. 6. An instruction of the court to the jury must be adapted to the facts of the case. *People* vs. *Honshell*, 10 Cal. 83; *People* vs. *Byrnes*, 30 Cal. 206.

SEC. 7. An error of the judge in violating article six, section seven, of the constitution would not, under all circumstances, be sufficient cause for reversal. *Prima facie*, it would be sufficient; but no more importance is to be attached to an error of this nature than any other. If no

injury could possibly have resulted from it, it cannot vitiate the judgment. *People* vs. *Yarrab*, 17 Cal. 166.

SEC. 8. The constitution prohibits judges from charging juries with respect to matters of fact, except to state the testimony and declare the law resulting from the evidence. *Ford* vs. *Chambers*, 19 Cal. 143.

SEC. 9. An instruction to the jury "to find for the defendant, as plaintiff has failed to prove a redemption," is clearly erroneous. The question of redemption was the main point in issue. *Battersby* vs. *Abbott*, 9 Cal. 565.

SEC. 10. When facts are admitted and there is no dispute in regard to them, and the law upon those facts declares the transaction fraudulent, it is not a question for the jury. The court in such case may direct the jury how to find, and may set aside the verdict if they find to the contrary. *Chenny* vs. *Palmer*, 6 Cal. 119.

SEC. 11. Where the answer is insufficient as a denial of the allegations in the complaint, and the court having instructed the jury to find for plaintiff: *Held*, that the instruction was right—no evidence being required on the part of plaintiff. *Kuhland* vs. *Sedgwick*, 17 Cal. 123.

SEC. 12. When certain allegations of fact in the complaint are admitted in the answer, an instruction by the court to the jury that the admitted facts will be taken by them as true and that they will so find for the plaintiff, is not an instruction to the jury to find the verdict in favor of plaintiff, except as to the facts so admitted. *Blood* vs. *Light*, 31 Cal. 115.

SEC. 13. *Instructions where the Evidence is Insufficient.*—Where there is only such slight evidence as is plainly insufficient to establish a point, it is proper for the court to instruct the jury to that effect and withdraw it from their consideration. *Selden* vs. *Cashman*, 20 Cal. 56; *People* vs. *Dick*, 24 Cal. 663.

SEC. 14. *Conflicting Instructions.*—If the court gives an instruction correctly stating the law, and afterwards another nullifying the first, the judgment will be reversed. *People* vs. *Campbell*, 30 Cal. 312.

SEC. 15. The court should refuse to instruct the jury on abstract questions of law. *Fowler* vs. *Smith*, 2 Cal. 39;

Benham vs. *Rowe*, 2 Cal. 387; *Brånger* vs. *Chevalier*, 9 Cal. 353.

SEC. 16. *The Court should Give or Refuse Instructions as asked for.*—The court should give or refuse instructions to the jury as asked for, and though the phraseology may be modified to make it more intelligible yet the sense must not be altered. *Conrad* vs. *Lindley*, 2 Cal. 173; *Jamson* vs. *Quivey*, 5 Cal. 490; *Russell* vs. *Amadore*, 3 Cal. 400.

SEC. 17. *Held*, that where an instruction asked for by defendant, if given entire would have been erroneous, the court was not bound to separate the concluding clause and give that by itself, and was therefore right in refusing the instruction. *Smith* vs. *Richmond*, 19 Cal. 476.

SEC. 18. The facts are to be found by the jury from the evidence, and it is error for the court in its charge to assume as proven a fact which is not in issue. *Caldwell* vs. *Center*, 30 Cal. 539.

SEC. 19. *Judge may Read from Memoranda.*—It is not error for the judge, in stating the testimony to the jury, to read a memorandum of testimony taken by another person instead of using his own minutes or making the statement from recollection. *People* vs. *Boggs*, 20 Cal. 432.

SEC. 20. If an instruction be refused for the reason that it has already been given (*Belden* vs. *Henriques*, 8 Cal. 87), the reason of the refusal should be stated so as not to mislead the jury. *People* vs. *Ramirez*, 13 Cal. 172.

SEC. 21. It is not error to refuse an instruction asked when the same has already been given in substance. *People* vs. *King*, 27 Cal. 507. If the court has already given the law correctly to the jury upon a given point, it is not error to refuse a second instruction upon the same point. *People* vs. *Williams*, 32 Cal. 280.

SEC. 22. It is error, after the jury have retired, to allow them to come into court and instruct them, in the absence of the parties or their counsel. Such instructions will be considered important if the contrary is not shown from the very fact that the jury have asked for them. 5 *Cal.* 148.

SEC. 23. After a cause tried in a justice's court has been submitted to the jury and they have retired to consider of their verdict, it is not irregular in the justice, at the request of the jury, to give them further instructions upon the law

of the case if the parties are or have an opportunity of being present. 13 *Wend.* 274.

SEC. 24. It is irregular for the justice to go to the jurors' room, after they have retired, and give them further instructions; if such are required it must be done in open court. 2 *Penn.* 659.

SEC. 25. A justice is not bound to give instructions to a jury; if he gives wrong instructions it is error. 16 *Barb.* 96.

SEC. 26. A judgment rendered by a justice's jury will be reversed, if the justice has instructed the jury wrongly, though the verdict be for the defendant in an action for a penalty. 6 *Hill*, 326.

SEC. 27. Where the instructions of the court, though incorrect in law, are all in favor of the defendant, he cannot complain of error. 5 *Cal.* 342.

CHAPTER LX.

JUDGMENT.

	SECS.		SECS.
DEFINITION OF	1- 4	IN CASES OF ARREST	36
IS PROPERTY	5	IN REPLEVIN	37
WHEN VALID	6-12	OFFER TO ALLOW	38
BY DEFAULT	13-22	BY CONFESSION	39-40
HOW AND WHEN TO BE RENDERED	23-26	FORM OF STATEMENT AND CONFESSION, ETC	41-44
ON JOINT AND SEVERAL CONTRACTS	27-29	COSTS TAXED IN	45-46
SPECIFIC CONTRACTS	30-31	INTEREST ON	47-48
WHEN CLAIM EXCEEDS JURISDICTION	32-35	LIEN OF, BY JUSTICE	49

Definition.

SECTION 1. A judgment is the decision or sentence of the law, given by a court or competent tribunal, as the result of proceedings instituted therein for redress of an injury. To be valid, it must be given by a competent judge or court, at a time and place appointed by law and in the form it requires. 7 *Cal.* 449.

SEC. 2. A judgment is the final determination of the

rights of the parties in the action or proceeding. *Pr. Act*, 144; *Gen. Laws*, 5084.

SEC. 3. "A judgment," says the statute, "is the final determination of the rights of the parties in the action or proceeding"; and the rendition of the judgment is the conclusion of the controversy. Whatever relates to the merits is merged in the judgment and becomes *res judicata;* and, if there are issues upon which the judgment is not conclusive, they must be determined in a different action. 16 *Cal.* 382.

SEC. 4. A judgment is a debt of record, and the parties to it are called judgment creditor and judgment debtor. 7 *Cal.* 203.

Is Property.

SEC. 5. A judgment is property—per Burnett Murray dissenting—(7 *Cal.* 203), which may be purchased like any other property. 12 *Cal.* 262. A judgment entered on the forfeiture of a recognizance, is the property of the state. 12 *Cal.* 50.

When Valid.

SEC. 6. If any part of the entire consideration of a contract is illegal, the whole contract is void. So, if an entire judgment be composed of several elements and one or more of them is illegal, the whole judgment is void, as against creditors. 7 *Cal.* 355; 8 *Cal.* 129.

SEC. 7. Where a cause is tried before a justice and he hears and decides the matter in dispute and makes a memorandum on a piece of paper of what the judgment was which he had concluded on, and gave such a memorandum to his clerk or friend to be made out and entered on his docket in form, but which was never so entered nor the memorandum preserved, there is no valid judgment. Though the judgment need not be in precise legal form in order to be valid, yet it must be entered on paper and the evidence of it on paper be preserved, in order to constitute a subsisting judgment. 2 *Chand.* (Wis.) 110.

SEC. 8. A justice's judgment, not signed by him, is bad. 3 *Mich.* (Gibbs) 207.

SEC. 9. Judgment for the plaintiff, generally, without stating against whom, is sufficient in the justice's court of New Jersey. 1 *Harr.* 86.

SEC. 10. An entry by a justice, that "this case, for the want of proof to sustain the plaintiff's demand, was dismissed at the plaintiff's costs," was held to be a judgment upon the merits and not of nonsuit. 2 *Eng.* 55.

SEC. 11. "I give judgment with the jury," is not a sufficient render of judgment by a justice. 2 *Penn.* 848, 944.

SEC. 12. A void judgment cannot be ratified. 10 *Watts*, 118.

By Default.

SEC. 13. When the defendant fails to appear and answer, judgment shall be given for the plaintiff, as follows:

1st. When a copy of the account, note, bill or other obligation, upon which the action is brought was filed with the justice at the time the summons was issued, judgment shall be given, without further evidence, for the sum specified in the summons.

2d. In other cases, the justice shall hear the evidence of the plaintiff and render judgment for such sum only as shall appear by the evidence to be just, but in no case exceeding the amount specified in the summons. *Gen. Laws*, 5523.

SEC. 14. Where the summons has been duly served, a judgment by default amounts to a confession, on the part of the defendants, of all the material facts in the complaint. 10 *Cal.* 441.

SEC. 15. The allegations of a complaint are confessed by a default. 11 *Cal.* 47.

SEC. 16. Where an administrator does not set up his privileges by demurrer or answer, but suffers judgment to go by default, it is a confession that he is properly sued. 10 *Cal.* 555.

SEC. 17. A justice should not render judgment on default without requiring full and competent proof of the plaintiff's demand. 3 *Wis.* 736.

SEC. 18. A justice having regularly heard a cause, *ex parte*, in the defendant's absence, cannot afterwards open the matter and proceed to a rehearing without the plaintiff's consent. He is bound to enter judgment according to the proof, and give the plaintiff a transcript, if it be a case requiring a transcript, and if he refuse, *mandamus* will lie commanding him to do so. 8 *Cow.* 133.

SEC. 19. A judgment by default will be set aside on the ground of surprise. 2 *Cal.* 250.

SEC. 20. It is no ground for setting aside a judgment by default that the defendant was ignorant of the law requiring him to answer in ten days. 9 *Cal.* 130.

SEC. 21. An application to open a default must be accompanied by some showing of merits. In the absence of such showing it will be denied. 21 *Cal.* 306.

SEC. 22. A judgment by default for an amount exceeding that asked for in the prayer of the complaint is erroneous. Where the complaint prayed judgment for a certain amount then alleged to be due, as principal and interest of the note sued on, and that the judgment bear interest at a certain rate, and judgment by default was subsequently rendered for the amount with interest from the date of filing the complaint: *Held*, that the judgment was erroneous, in awarding interest from the date of filing the complaint instead of the date of its entry. 20 *Cal.* 91.

How and When to be Rendered.

SEC. 23. Upon issue joined, if a jury trial be not demanded, the justice shall hear the evidence, and decide all questions of fact and of law, and render judgment accordingly. *Pr. Act*, 593; *Gen. Laws*, 5524.

SEC. 24. A judgment obtained against a defendant is erroneous and reversible, if it was rendered before the day at which the defendant was summoned to attend. 33 *Maine* (3 Red.) 368.

SEC. 25. Upon a verdict, the justice shall immediately render judgment accordingly. When the trial is by the justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within four days after the close of the trial. *Pr. Act*, 594.

SEC. 26. In New York, a justice must enter judgment immediately after the verdict of the jury is rendered; and if he omit to do so until the next day, his judgment is void. 3 *Denio*, 72.

On Joint and Several Contracts.

SEC. 27. If the action be on a contract against two or

more defendants, and the summons is served on one or more but not on all, the judgment shall be entered up only against those who were served or have voluntarily appeared, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all and the individual property of the defendants served or who have voluntarily appeared in the action. *Pr. Act*, 594.

SEC. 28. At common law, where a joint action was brought against several defendants, and one of them was not served, no judgment could be entered against the rest, until such defendant was driven to outlawry. To avoid the expense and delay of such a proceeding our statute has made provision as to defendants not served, leaving the law to stand as it did before as to those brought in by summons. Upon a joint and several obligation, a several judgment is no bar to a joint action against all the obligors, and *e converso*. 6 *Cal.* 182. In an action brought against two defendants on a joint and several obligation, the entry of final judgment in default against one of the defendants is a discharge of the other. 6 *Cal.* 176.

SEC. 29. There is nothing in the practice act which has altered the common-law rule in this respect. 6 *Cal.* 83. In an action against defendants jointly indebted, where one is served, a several judgment may be entered against him. 6 *Cal.* 609.

Specific Contracts.

SEC. 30. In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein. *Pr. Act*, 594; *Gen. Laws*, 5525.

SEC. 31. The specific contract act is not in conflict with the constitution of this state, nor is it opposed to the principles of essential justice. 26 *Cal.* 47.

When Claim exceeds Jurisdiction.

SEC. 32. When the amount found due to either party

exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue. *Pr. Act, Gen. Laws*, 5526.

SEC. 33. Where judgment for damages is for more than the amount claimed in the complaint the excess may be remitted and the judgment stand. 14 *Cal.* 419.

SEC. 34. Judgment cannot be rendered in favor of plaintiff for a greater sum than the amount of damages laid by him. 3 *Cal.* 396.

SEC. 35. A creditor who knowingly takes a judgment against a debtor for an amount greater than the debt then due, is postponed to other creditors. 7 *Cal.* 356.

In Cases of Arrest.

SEC. 36. When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it shall be so stated in the judgment, and entered in the docket. *Pr. Act*, 597; *Gen. Laws*, 5528.

In Replevin.

SEC. 37. In an action of replevin where the defendant has required the return of the propery and given an undertaking for such purpose, a judgment for plaintiff in order to hold the sureties on the undertaking must be in the alternative, as required by sections one hundred and four, one hundred and seventy-seven, two hundred and two hundred and ten, of the practice act. 7 *Cal.* 568. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against the defendant. 7 *Cal.* 568.

Offer to Allow.

SEC. 38. If the defendant, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and if he recover deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect

the recovery otherwise than as to costs, as above provided. *Pr. Act*, 596; *Gen. Laws*, 5527.

By Confession.

SEC. 39. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant or both, in the manner prescribed by this chapter. *Pr. Act*, 374.

SEC. 40. A statement, in writing, shall be made, signed by the defendant and verified by his oath, to the following effect:

1st. It shall authorize the entry of judgment for a specified sum.

2d. If it be for money due or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due or to become due.

3d. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same. *Pr. Act*, 375.

SEC. 41. The following is a form of statement and confession:

Statement and Confession of Judgment without Action, and Entry of Judgment.

In the justice's court, ... township, county of ....., state of .....

....
vs.
....

I, ..., the defendant in the above-entitled action, do hereby confess judgment therein in favor of ...., the plaintiff in said action for the sum of .... hundred dollars, gold coin of the United States, and authorize judgment to be entered therefor against me with legal interest thereon from this date.

This confession of judgment is for a debt justly due and owing to the said plaintiff, arising upon the following facts, to wit:

On the ..... day of ..... I did execute and deliver to said plaintiff my promissory note, for the sum of .... hundred dollars, payable in ... months from date, and bearing interest from date at the rate of .... per cent. per month until paid, in gold coin of the United States; that said note was given for the amount due said plaintiff for goods, wares and merchandise, by him sold and delivered to me before that time [state the manner in which the

debt was created; if no note was given, say for "goods, wares and merchandise, before this date sold and delivered to me at my request, amounting to the sum of .... hundred dollars"] no part of which has ever been paid to said plaintiff.

....,
Defendant in person.

State of .....,
county of ..... } ss.

...., being duly sworn, says that he is the person who signed the above statement, and that he is indebted to the said .... in the sum of .... hundred dollars, gold coin of the United States in said statement mentioned, and that the facts stated in the above confession and statement are true.

....

Subscribed and sworn to before me, this .... day of ...., A.D. 18..

....,
Justice of the peace in and for said township.

Entry of Judgment on the Foregoing Confession.

In the justice's court in and for ..... township, county of ... ., state of .....

....
vs.
....

In this action, the defendant, ..., having filed his confession of judgment, wherein he authorizes and consents that judgment be entered in favor of the plaintiff, ..., for the sum of .... hundred dollars, gold coin of the United States:

It is therefore by reason of the law and the premises aforesaid, ordered, adjudged and decreed, that ...., the said plaintiff, do have and recover of and from ...., the said defendant, ... hundred dollars, gold coin of the United States, with interest thereon at the rate of .... per cent. per annum, from the date hereof, until paid, together with the sum of .... dollars costs herein.

....,
Justice of the peace.

Dated this .... of ...., 18 ...

[In this form the entry of judgment is indorsed on the statement and confession.]

SEC. 42. The legislature did not intend more definiteness of particularity in cases of confession of judgment than in complaints upon the same cause of action in the ordinary course of procedure. 12 *Cal.* 147.

SEC. 43. *Must be Signed by Each.*—Under the practice act of 1850, a judgment by confession is invalid, unless the instrument authorizing its entry is signed by each of the persons against whom it authorizes judgment to be entered. *Chapin* vs. *Thompson*, 20 Cal. 681.

SEC. 44. Where, under said act, two persons signed a confession of judgment against themselves and two others: *Held*, that the judgment entered thereon being void as to those not signing, was equally so as to those signing, and that the authority being to enter a judgment against four, no judgment thereunder could be entered against a less number. 20 *Cal.* 681.

Costs Taxed.

SEC. 45. When the prevailing party is entitled to costs by this chapter, the justice shall add their amount to the verdict; or, in case of a failure of the plaintiff to recover or in case of a dismissal of the action, shall enter up judgment in favor of the defendant for the amount of such costs. *Pr. Act*, 598; *Gen. Laws*, 5529.

SEC. 46. Taxing the costs is a judicial act; therefore, where a justice entered the verdict in his docket immediately upon its being rendered but omitted to complete the taxation of costs until eight days afterwards, it was held that the judgment was erroneous. 3 *Denio*, 72.

Interest on.

SEC. 47. In a judgment in a suit on a note bearing interest, the interest is to be computed and made part of the judgment and the judgment to bear the agreed interest. 6 *Cal.* 155.

SEC. 48. In a judgment in a suit on a note bearing an agreed amount of interest, the interest is to be computed and made a part of the judgment and the judgment should bear the agreed interest. 9 *Cal.* 294.

Lien of—By Justice.

SEC. 49. No judgment rendered by a justice of the peace shall create any lien upon any lands of the defendant, unless a transcript of such judgment, certified by the justice, be filed and recorded in the office of the recorder. When such transcript is to be filed in any other county that that in which the justice resides, such transcript shall be accompanied with the certificate of the county clerk as to the official character of the justice. When so filed and recorded in the office of the recorder for any county, such judgment

shall constitute a lien upon and bind the lands and tenements of the judgment-debtor situated in the county where such transcript may be filed and recorded in favor of such judgment-creditor, as if such judgment had been rendered in the district court of such county. *Pr. Act*, 599; *Gen. Laws*, 5530.

CHAPTER LXI.

LANDLORD AND TENANT.

	SECS.		SECS.
RELATION OF TENANT TO LANDLORD	1- 4	WHAT ARE	13-20
EVICTION OF TENANT	5- 7	ASSIGNOR OF LEASE HOLDS ESTATE	21-23
RENTS, PAYMENT OF	8-12	REMOVAL OF	24-31
TENANT ENTITLED TO FIXTURES,		FORMS OF LEASE ETC.	32

Relation of.

SECTION 1. A person who enters into possession of land under another cannot question the title of him under whom he holds. *Pierce* vs. *Minturn*, 1 Cal. 470. A tenant cannot dispute his landlord's title, nor can he set up against his landlord an outstanding title without first surrendering possession. *Tewksberry* vs. *Magraff*, 33 Cal. 237. Nor can he deny the title of the vendor of the landlord. *McKune* vs. *Montgomery*, 9 Cal. 575. And if a person acquires possession of land from a tenant with the full knowledge of the tenancy he cannot deny the landlord's title. *Anderson* vs. *Parker*, 6 Cal. 197.

SEC. 2. *Tenant cannot Destroy his Tenancy.*—The tenant cannot, by submitting to being wrongfully turned out of possession under a writ which did not run against him and then attorning to the plaintiff in the writ, prevent his first landlord from recovering possession against him for non-payment of rent. 31 *Cal.* 333.

SEC. 3. Although, as a general rule, a tenant cannot dispute his landlord's title, he may show that it has terminated or that his attornment was made under mistake of fact or by fraud. 8 *Cal.* 592.

SEC. 4. If the tenant is evicted by a wrong-doer the landlord is not bound to indemnify him. 23 *Cal.* 227.

Eviction of Tenant.

SEC. 5. *Title Paramount.*—If the tenant is evicted by title paramount, and the landlord defends the action and after the eviction appeals, the taking of the appeal does not restore the relation of landlord and tenant which has been destroyed by the eviction, so as to enable the landlord to commence an action against the tenant for holding over, if such action is commenced before a reversal of the judgment. 34 *Cal.* 265.

SEC. 6. If a party hold a lease from one of two tenants in common for certain premises, and the other tenant in common afterwards takes possession of a part of the common property, the lessee has no remedy against him, and will be entitled to an abatement *pro tanto* in his rents. Evidence tending to show that the defendant was kept out of possession of part of the leased premises by a tenant in common of the lessor or his agent, should have been admitted. 1 *Nev.* 434.

SEC. 7. It has been decided that the entry of a landlord upon his tenant's premises without his consent during the lease and reletting them, was a discharge of the tenant from his covenants, except as to such part of the rent as had accrued at the time of re-entry, which the landlord is entitled to recover: *Held*, that the above exception is in abrogation of one of the plainest principles of law, and if the case were new the court would overrule it. 2 *Cal.* 374.

Rents, Payment of.

SEC. 8. The right to recover rents and profits for use and occupation is founded alone on contract. 3 *Cal.* 373.

SEC. 9. To enable a party to recover rent, *eo nomine*, he must show that the defendant's possession was by virtue of some express or implied agreement, and no action will lie where the possession was adverse or tortious, for such possession excludes all idea of contract. Thus, *assumpsit* will not lie to recover rent for premises the possession of which the plaintiff had previously recovered by ejectment against the defendant. 5 *Cal.* 223.

SEC. 10. A clause in a lease exempting the tenant from liability to restore the house in case it should be destroyed

by fire, does not relieve him from paying rent in case of such destruction. 4 *Cal.* 340.

SEC. 11. A person who, after the commencement of an action to foreclose a mortgage, acquires possession of the premises from one of the defendants and continues to occupy after a sale under the decree of foreclosure, is a "tenant in possession," and liable as such to the purchaser for the rents and profits accruing between the sale and the execution of the sheriff's deed. 21 *Cal.* 135.

SEC. 12. Where a lease contained the usual covenants for payment of rent and re-entry for non-payment, and provided for the appraisement of improvements erected by the lessee, and payment of their value by the lessor at the expiration of the term, and the lessor re-entered for non-payment of rent: *Held*, that the lessee could not maintain an action upon being evicted for the value of his improvements. If the lessee has any remedy he must wait until the time expires which the contract has fixed. He cannot by his own default change, in his own favor, the terms of the contract and fix upon the lessor a contract he never made. 11 *Cal.* 302, 303.

Fixtures, Entitled to.

SEC. 13. A fixture is an article of a personal nature affixed or annexed to the freehold; that is, fastened to or connected with it; mere juxtaposition or the laying of an object, however heavy, on the freehold does not amount to annexation. A fixture may exist on public land. The title to the land, whatever it is, carries with it the title to the structures annexed to the soil. 14 *Cal.* 64.

SEC. 14. Tenants have a right to remove buildings erected by them at any time before the expiration of their leases, but not after a forfeiture or re-entry for covenant broken. 8 *Cal.* 36.

SEC. 15. The rule in reference to fixtures is applied with different degrees of strictness as between different parties. A tenant who puts up machinery for a mill in a house leased, and fastens it by bolts, screws, etc., to the house, has the right to remove it. But as between vendor and vendee the machinery would be considered as part of the realty. 9 *Cal.* 121, 122.

SEC. 16. Where a tenant had erected a barn on pattens and blocks of timber lying on the ground, but not fixed in or to the ground, it was held he might take them away at the end of his term. The general rule is, that to constitute an article a fixture—*i. e.*, a part of the realty—it must be actually annexed thereto, and, *e converso*, whatever is so annexed becomes part of the realty, and the person who was the owner of it when a chattel loses his property in it. 14 *Cal.* 65.

SEC. 17. Where a landlord agreed to allow his tenant a reasonable time, after the expiration of his lease, to remove his buildings, and the tenant surrendered or forfeited his lease before the expiration thereof, the intention of the parties must be confined to its legal expiration and not to the wrongful act of the lessee in terminating it, and the lessee can claim no right under the contract. 8 *Cal.* 36.

SEC. 18. The rule of law in regard to fixtures, as between landlord and tenant, may be summed up as follows: The tenant may, at any time before his term of tenancy expires, sever and take from the freehold all such fixtures of a chattel nature as he has himself erected upon it, either for the purpose of ornament, domestic convenience or to carry on a trade: *provided*, always, that the removal can be effected without material injury to the freehold. *Merritt* vs. *Judd*, 14 Cal. 59. There have been upon this subject frequent adjudications, which may serve to throw some light on the relative rights of landlord and tenant. They, however, embrace only a few conditions of things compared with the many that may exist. It is admitted that tenants may remove baker's ovens, salt-pans, carding machines, cider mills and furnaces, steam engines, soap boilers, vats and copper stills, mill stones, Dutch barns standing on a foundation of brick-work set in the ground; a varnish-house built upon a similar foundation, with a chimney, and a ball-room erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil, and also things ornamental or for domestic convenience, as furnaces, stoves, cupboards and shelves, bells and bell-pulls, gas fixtures, pier and chimney-glasses, although attached to the wall with screws; marble chimney-pieces, grates, window-blinds and curtains. The

decisions are, however, adverse to the removal of hearth-stones, doors, windows, locks and keys, because such things are peculiarly adapted to the house in which they are affixed; also, to all substantial additions to the premises, as conservatories, green-houses (except those of a professional gardener), stables, pig-sties and other out-houses, shrubbery and flowers planted in a garden. Nor has the rule been extended to erections for agricultural purposes, though it is difficult to perceive why such fixtures should stand upon a less-favored basis than trade-fixtures when the relative importance of the two arts is considered. *Taylor on Landl. and Ten.* Secs. 544–550.

SEC. 19. The time for exercising this right of removal is a matter of some importance. A tenant for years may remove them at any time before he gives up the possession of the premises, although it may be after his term has expired and while he is holding over. But tenants for life or at will, having uncertain interests in the land, have after the determination of their relation as tenants, not occasioned by their own fault, a reasonable time within which to remove their fixtures. 3 *Atk.* Ch. 13. If a tenant quits possession of the land without removing such fixtures as he is entitled to, the property in them immediately vests in the landlord, and though they are subsequently severed the tenant's right to them does not revive.

SEC. 20. If, therefore, a tenant desires to have any such things upon the premises after the expiration of his term for the purpose of valuing them to an incoming tenant or the like, he should take care to get the landlord's consent, otherwise he will lose his property in them entirely. 1 *B. & A. K. B.* 394. The rights of parties—tenants or landlords—with respect to particular articles are sometimes regulated by local customs, especially as between outgoing and incoming tenants, and in cases of this kind it becomes a proper criterion by which to determine the character of the article and whether it is a fixture or not. *Viner's Ab. Landl. & Ten.* and *Washb. Real Prop.*

Assignor of Leasehold Estate.

SEC. 21. The assignor of a leasehold estate, who has

parted with his whole interest therein, is not liable for the rents and profits of the premises after the assignment from the single fact that his assignee has continued to occupy them. 1 *Cal.* 475.

SEC. 22. Executors who have entered into and possessed a leasehold estate of which their testator was assignee, are liable for the rents accruing during the possession as assignees *de bonis propriis*. 6 *Cal.* 606.

SEC. 23. In *Walton* vs. *Cronly's Administrator* (14 Wend. 63), the action was brought for the recovery of rent due upon a lease executed by the plaintiff to one Dillon who had assigned the lease to Cronly, the intestate, but remained in possession of the premises. The assignment, as in the case at bar, was absolute upon its face, but was proved by parol evidence to have been intended as a security by way of mortgage for a pre-existing debt. The court held, on the authority of *Astor* vs. *Hoyt*, that a mortgage out of possession was not liable for rent; and further, that the parol evidence was admissible, not only as between the parties to the instrument, but where third persons were concerned, if no trust or confidence had been reposed upon the absolute form of the instrument and they had not been thereby misled. 15 *Cal.* 293. In this state a mortgage of a term in possession is not liable as assignee upon the covenants of the lease. 15 *Cal.* 287.

SEC. 24. *Conventional Landlord can alone Remove Tenant.* —The right to remove a tenant under the act concerning forcible entries and unlawful detainers, is given to the conventional landlord alone and not to his successors in the estate. 29 *Cal.* 168.

SEC. 25. A demand of possession must be made by the landlord before bringing suit against his tenant for holding over. Such demand is indispensable, and is as necessary to be made before suit as that the relation of landlord and tenant should exist. *Paul et al.* vs. *Armstrong*, 1 Nev. 82.

SEC. 26. When a relation of landlord and tenant is once established, an action for unlawful detainer for holding over contrary to the terms of agreement between the parties for the cancellation of the leasehold may be maintained until

the relation is destroyed by a surrender of the demised premises or by law. 33 *Cal.* 401.

SEC. 27. In an action by the landlord against the tenant for an unlawful detainer, damages sustained by the landlord to property adjoining the demised premises in consequence of the tenant holding over cannot be recovered. 33 *Cal.* 401.

SEC. 28. If the landlord give notice to quit immediately after the expiration of the tenant's term, and the tenant hold over, the landlord may maintain ejectment without waiting one month after the notice. 28 *Cal.* 551.

SEC. 29. The landlord is not required to wait one month after notice to the tenant to quit before bringing ejectment to remove the tenant, unless by the *laches* of the landlord the relation of tenancy by sufferance has been established. 28 *Cal.* 551.

SEC. 30. Under the forcible entry and detainer act of April 27th, 1863, of California, an action for an unlawful holding over cannot be maintained, unless the relation of landlord and tenant is shown to exist between the plaintiff and defendant at the time of making plaintiff's demand for possession, as required by section four of said act. *Steinbach* vs. *Krone*, 36 Cal. 303.

SEC. 31. *Tenancy Terminated by the Eviction of Tenant.*—Where a tenant is evicted on final process in an action of ejectment by a party claiming title adverse to his lessor, of which action the latter had timely notice, the tenancy is thereby determined, and a subsequent taking and holding by the tenant under a lease from the evictor is not in subordination to the title of his original lessor, and an action by the latter against the tenant under the forcible entry and detainer act, for an unlawful holding over, may be successfully resisted by the tenant by showing such judgment and eviction. 36 *Cal.* 303.

SEC. 32. The following is a form of lease, etc.:

Form of Lease.

This indenture, made the .... day of ...., in the year of our Lord one thousand eight hundred and ...., witnesseth, that .... does hereby lease, demise and let, unto.... .... [here describe the property].

To have and to hold, for the term of ...., to wit: from the .... day of

...., A.D. 18.., to the .... day of ...., A.D. 18.., yielding and paying therefor the rent of .... dollars, gold coin of the United States of America, and the said lessee promises to pay the said rent in such gold coin and as follows, to wit: [state terms of lease] and to quit and deliver up the premises to the lessor or ...., agent or attorney, peaceably and quietly, at the end of the term, in as good order and condition (reasonable use and wear thereof and damages by the elements excepted) as the same are now or may be put into, and to pay the rent as above stated during the term; also the rent as above stated for such further time as the lessee may hold the same, and not make or suffer any waste thereof; nor lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made, any alterations therein, but with the approbation of the lessor thereto, in writing, having been first obtained; and that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent as aforesaid or make or suffer any strip or waste thereof.

And should default be made in the payment of any portion of said rent when due, and for .... days thereafter, the lessor .... agent or attorney, may re-enter and take possession at .... option and terminate this lease.

.... [L.S.]

Signed, sealed and delivered, in the presence of

....

Another Form.

This indenture, made the .... day of ...., in the year of our Lord one thousand eight hundred and ...., between .... and ...., the party of the second part, witnesseth, that the said party of the first part, has granted, demised and to farm let, and by these presents does grant, demise and to farm let unto the said party of the second part [describe property], with the appurtenances, for the term of .... from the ... day of .... A.D. one thousand eight hundred and ...., at the .... rent or sum of .... dollars, payable [state terms].

And it is hereby agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom.

And the said party of the second part does hereby covenant, promise and agree, to pay the said party of the first part the said rent in the manner herein specified. [Insert specifications.] And at the expiration of the said term, the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And the said party of the first part does hereby covenant, promise and agree, that the said party of the second part, paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy, the said premises for the term aforesaid.

In witness whereof, we have hereunto set our hands and seals the day and year first above written.

.... [L.S.]

.... [L.S.]

Signed, sealed and delivered, in presence of

....

Form of Notice to Quit, by Landlord.

To ....., esq.:

Take notice, that you are hereby required to quit and deliver up to me possession of the premises now held and occupied by you, being the premises known as [or, "situated"; give description], at the expiration of the month [or, "week," or, "year," as may be] of your tenancy of said premises, commencing on the .... day of ...., A.D. 18.., and ending on the .... day of ...., A.D. 18.. This is intended as a month's notice to quit, for the purpose of terminating your tenancy aforesaid.

Dated .... day of...., 18..

Form of Notice of Quitting Premises by Tenant.

To ...., landlord:

Please take notice, that I shall quit possession and deliver up the premises now held and occupied by me, being the premises [description] at the end of tenancy, to wit: on the .... day of ...., 18.., as I intend to remove therefrom and to terminate the said tenancy. Yours, etc.,

....

Dated .... day of ...., 18..

CHAPTER LXII.

LIENS OF MECHANICS AND OTHERS.

	SECS.		SECS.
MECHANICS.....	1–6	INNKEEPERS.....	10
STABLE AND RANCHMEN.....	7	CARRIERS.....	11–12
POSSESSION OF, NECESSARY.....	8	VENDORS OF REAL ESTATE.....	13
MASTER OF A SHIP.....	9		

SECTION 1. The following is an act for securing liens of mechanics and others, approved March 30th, 1868:

1. Every mechanic, artisan, machinist, builder, contractor, lumber-merchant, miner, laborer and other person, performing labor upon or furnishing materials of any kind to be used in the construction, alteration or repair, either in whole or in part, of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon-road, aqueduct to create hydraulic power for mining or other purposes, or any other structure or superstructure, or who shall perform labor in any mining claim, shall have a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done

or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, sub-contractor, architect, builder or other person, having charge of any mining or of the construction, alteration or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act.

2. The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, shall also be subject to the liens created by this act if, at the time the work was commenced or the materials for the same had commenced to be furnished, the said land belonged to the person who caused said building or other improvement to be constructed, altered or repaired; but if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien; and in case such interest shall be a leasehold interest, and the holder thereof shall have forfeited his right thereto, the purchaser of such building or improvement and leasehold term, or so much thereof as remains unexpired at any sale under the provisions of this act, shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay the lessor all arrears of rent or other money and cost due under said lease, unless the lessor shall have regained possession of the said land and property, or obtained judgment for the possession thereof prior to the commencement of the construction, alteration or repair, of the building or other improvement thereon; in which event said purchaser shall have the right only to remove the building or other improvement within thirty days after he shall have purchased the same, and the owner of the land shall receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal.

3. All liens created by this act upon any land or mining claim shall be preferred to any lien, mortgage or other incumbrance, which may have attached to said land or mining claim subsequent to the time when the building or other

improvement was commenced or the materials were begun to be furnished; also, to any lien, mortgage or other incumbrance, which was unrecorded at the time when said building or other improvement was commenced or the materials of the same were commenced to be furnished; and all liens created by this act upon any building or other improvement shall be preferred to all prior liens, mortgages or other incumbrances, upon the land upon which said building or other improvement shall have been constructed or situated when altered or repaired; and in enforcing such lien, such building or other improvement may be sold separately from said land, and when so sold, the purchaser may remove the same within a reasonable time thereafter, not to exceed thirty days, upon the payment to the owner of the land of a reasonable rent for its use from the date of his purchase to the time of removal: *provided*, that if such removal be prevented by legal proceedings, said thirty days shall not begin to run till the final determination of such proceedings in the court of first resort, or in the appellate court if appeal be taken.

4. Every building or other improvement mentioned in the first section of this act, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner or person having or claiming an interest therein shall within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land or upon the building or other improvement situated thereon.

5. It shall be the duty of every original contractor within sixty days after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber-merchant, miner, laborer or other person, save the original contractor, claiming the benefit of this act, within thirty days after the

completion of any building, mining claim or other improvement, or the performance of any labor in any mining claim or after the completion of the alteration or repair thereof, to file with the county recorder of the county in which such building or other improvement or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and effects, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with said lien, sufficient for identification, which claim shall be verified by the oath of himself or of some other person.

6. The county recorder shall record said claim in a book kept by him for that purpose, which record shall be indexed as deeds and other conveyances are required by law to be indexed, and for which he shall receive the same fees as are allowed by law for recording deeds and other instruments.

7. In every case in which one claim shall be filed, under the provisions of this act, against two or more buildings, mining claims or other improvements, owned by the same person, the person filing such joint claim shall at the same time designate the amount due to him on each of such buildings, mining claims or other improvements; otherwise such claim shall be postponed to other lienholders, and the lien of such claimant shall not extend beyond the amount so designated as against other creditors having liens by judgment, mortgage or otherwise, upon either of such buildings or other improvements or upon the land upon which the same are situated: *provided*, that no joint claim shall be filed upon two or more buildings, unless they are contiguous to or adjoining each other.

8. No lien provided for in this act shall bind any building, mining claim or other improvement, for a longer period than ninety days after the same shall have been filed, unless suit be brought in a proper court within that time to enforce the same, or if a credit be given, then ninety days after the expiration of such credit; but no lien shall be continued in force for a longer time than two years from the time the work is completed by any agreement to give credit.

9. Any person who shall at the request of the owner of any lot in any incorporate city or town, grade, fill in or otherwise improve, the same, or the street in front of or adjoining the same, shall have a lien upon such lot for his work done and materials furnished in grading, filling in or otherwise improving, the same; and all the provisions of this act respecting the securing and enforcing of mechanics' liens shall apply thereto.

10. *First*—Suits to enforce the liens created by this act, except those under section fifteen, shall be brought in the district courts, and the pleadings, process, practice and other proceedings, shall be the same as in other cases: *provided*, that where service of summons may be made under the practice act by publication, the time of publication, where the defendant resides out of or is absent from the state or for any other cause, cannot be served personally and [need] be but once a week for four consecutive weeks, and the time for answering shall expire when such publication is complete, and if no answer of such defendant is then filed, his default may be entered; and, *provided*, also, that the court may in its discretion, in all cases under this act, instead of ordering publication, or may after publication, appoint an attorney to appear for the non-resident, absent or concealed, defendant and conduct the proceedings on his part.

Second—In case the proceeds of any sale under this act shall be insufficient to pay all lienholders under it, the liens of all persons other than the original contractor and sub-contractors shall first be paid in full, or *pro rata*, if the proceeds be insufficient to pay them in full; and out of the remainder, if any, the sub-contractors shall then be paid in full or *pro rata*, if the remainder be insufficient to pay them in full; and the remainder, if any, shall be paid to the original contractor; and each claimant shall be entitled to execution for any balance due him after such distribution; such execution to be issued by the clerk of the court upon demand, after the return of the sheriff or other officer making the sale showing such balance due.

Third—In all suits under this act, the court shall, upon entering judgment for plaintiff, allow as a part of the costs

all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorneys' fees.

Fourth—All suits to enforce any lien created by this act shall have preference upon the calendar of the court over any civil suit already brought or to be brought, except suits to which the state shall be a party, and shall be tried by such court without unnecessary delay.

Fifth—In all suits to enforce any lien created by this act, all persons personally liable and all lienholders whose claims have been filed for record under the provisions of section five of this act shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien may, be made parties; but such as are not made parties shall not be bound by such proceedings.

11. Any contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished as aforesaid; and in all cases where a lien shall be filed under this act for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which such lien is filed; and in case of judgment against the owner or his property upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable.

12. Whenever any mechanic, artisan, machinist, builder, lumber-merchant, contractor, miner, laborer or other person, shall have furnished or procured any materials for use in the construction, alteration or repair, of any building or other improvement, such materials shall not be subject to

attachment, execution or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase-money thereof, so long as in good faith the same are about to be applied to the construction, alteration or repair, of such building, mining claim or other improvement.

13. Nothing contained in this act shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished, to maintain a personal action to recover said debt against the person liable therefor, and the person bringing such personal action may take out an attachment therefor, notwithstanding his lien, and in his affidavit to procure an attachment need not state that his demand is not secured by a lien; but the judgment, if any, obtained by the plaintiff in such personal action shall not be construed to impair or merge any lien held by said plaintiff under this act: *provided*, only, that any money collected on said judgment shall be credited on the amount claimed under such lien in any action brought to enforce the same in accordance with the provisions of this act.

14. The words "building or other improvement," whenever the same are used in this act, shall be held to include and apply to any wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon-road, aqueduct to create hydraulic power or for mining or other purposes, and all other structures and superstructures, whenever the same can be made applicable thereto; and the words "construction, alteration or repair," whenever the same are used therein, shall be held to include partial construction and all repairs done in and upon any building or other improvement.

15. Any mechanic, artisan or laborer, who shall make, alter or repair, any article of personal property, at the request of the owner or legal possessor of such property, shall have a lien on the same for his just and reasonable charges for work done and materials furnished, and may retain possession of the same until such just and reasonable charges shall be paid; and if not paid within the space of two months after the work shall be done, such mechanic or other person may proceed to sell the property by him so

made, altered or repaired, at public auction, by giving ten days' public notice of such sale by advertising in some newspaper published in the county in which the work was done, or if there be no newspaper published in such county, then by posting up notices of such sale in three of the most public places in the town where such work was done for ten days previous to such sale, and the proceeds of such sale shall be applied to the discharge of such lien and the cost of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof. *Pub. Laws*, 1868, 589.

SEC. 2. The following is a form of claim of lien by contractor:

Form of Claim of Lien by Contractor.

State of ....., } ss.
county of ..... }

I ...., being duly sworn, depose and say, that as carpenter, builder and contractor, I did erect and construct a certain .... building [name the kind of building], which said .... building, with the land on which the same is situated and adjacent thereto, was on the .... day of ...., 18.. [which is the day on which I commenced said building], and now is the property of ...., which said property is situate in the county of ...., state of ...., and described as follows, to wit: [here describe the property].

That it is my intention to avail myself of the act of the legislature of the state of ...., entitled "An act for securing liens of mechanics and others," approved .... .., 18.. ; and that it is my intention to claim and hold such lien upon the building so erected as aforesaid, together with a convenient space about the same with the said .... building situated thereon, and upon the interest of ...., the person with whom I contracted therein.

That the same was commenced on or about the .... day of ...., A.D 18.., and that .... days have not elapsed since the completion thereof.

I further state that said .... is indebted to me as such contractor and builder in the sum of .... dollars, ... of the United States, for work and labor on said building, as per agreement [state whether the agreement was in writing or otherwise], and he is also and in addition to said sum of money indebted to me in the further sum of .... dollars for extra work and labor [if any was done, state generally the work done], and in the further sum of .... dollars for [here state the materials furnished], furnished by me in the construction of said .... building above described and situated as aforesaid, which said materials and extra work furnished, and did, ... at the instance and request of said ...., making in the aggregate .... dollars, which sum of .... dollars, by .... agreement, was and is payable in the .... of the United States; that of said sum of money I have received .... dollars and hereby acknowledge the receipt thereof.

I further state that the sum of .... dollars, in .... of the United States, is now due and unpaid from said .... to me, and that there are

no offsets to the same or any part thereof, and that this statement is made after deducting all just credits and offsets to .... said claim.

....

Subscribed and sworn to this .... day of ...., A.D. 18.., before me.

....

SEC. 3. The following is a form of claim of lien by material-man:

Form of Claim of Lien by Material-man.

State of .....,
county of .....,} ss.

I, ..., being duly sworn, depose and say, that from the .... day of ...., 18.., to the .... day of ...., 18.., I did furnish materials for the construction of a certain [here describe the building, as whether it was a dwelling-house or other structure], which said building with the land on which the same is situated and adjacent thereto was, on said .... day of ...., 18.. [day first mentioned], and now is, the property of ...., which said property is situate in the county of ...., state of ...., and described as follows, to wit: [describe the property].

That it is my intention to avail myself of the act of the legislature of the state of ...., entitled "An act for securing liens of mechanics and others," approved .... .., 18..; and that it is my intention to claim and hold such lien upon the property aforesaid together with a convenient space about the same with the building situated thereon, and on the interest of .... therein.

That I commenced furnishing materials on or about the .... day of ...., A.D. 18.., and that .... days have not elapsed since the completion of said .... building.

I further state that said ...., as such owner [or .... as contractor] is indebted to me in the sum of .... dollars, ... of the United States, for materials, to wit: [here describe the materials furnished]; that said materials were by me furnished in the construction of said .... building above described and situated as aforesaid, which materials I furnished at the instance and request of said .... [or, said contractor, as the case may be], which sum of .... dollars, by agreement with him was and is payable in the .... of the United States.

I further state that the sum of .... dollars in .... of the United States is now due and unpaid from said .... [or, contractor] to me, and that there are no offsets to the same or any part thereof, and that this statement is made after deducting all just credits and offsets to said claim.

....

Subscribed and sworn to this .... day of ...., 18.., before me.

....

SEC. 4. The following is a form of claim of lien by journeyman carpenter:

Form of Claim of Lien by Journeyman Carpenter.

State of ..... ,
county of .....} ss.

I, ..., being duly sworn, depose and say, that I have performed

labor in the construction [or, "repair," or, "alteration," as the case may be] for ...., as journeyman carpenter in the erection, construction [or, "repairing," etc.] of a certain building [describe it by name], which said building, with the land on which the same is situated and adjacent thereto, was on said .... day of ...., 18 .. and now is the property of ...., which said property is situate ..... county of ....., state of ....., and described as follows, to wit: [here describe its location].

That it is my intention to avail myself of the act of the legislature of the state of ...., entitled "An act for securing liens of mechanics and others," approved .... day of ...., 18 ..; and that it is my intention to claim and hold such lien upon the property aforesaid, together with a convenient space about the same with the building situated thereon, and on the interest of .... therein.

That the same was commenced on or about the ..., day of .... A.D. 18.., and that thirty days have not elapsed since the completion thereof. I further state that .... is indebted to me in the sum of .... dollars, ... of the United States, for work and labor as a journeyman carpenter [here state the number of days and the price per day], which work and labor was done and performed by me in the construction of said building above described, and situated as aforesaid, which said work and labor was done and performed at the instance and request of said .... [or "...., principal contractor"] which said sum of .... dollars, by .... agreement was and is payable in the .... of the United States,

I further state that the sum of .... dollars in .... of the United States is now due and unpaid from said .... to .... and that there are no offsets to the same or any part thereof, and that this statement is made after deducting all just credits and offsets to .... said claim.

....

Subscribed and sworn to this .... day of ....., A.D. 18.., before me.

....

SEC. 5. If the owner of land wishes to avoid liability of a lien on his land, upon which a lessee or other person is about to place improvements, under section four (*ante*), he may do so by giving the following notice:

To all Whom it may Concern.

I, ..., am the owner of the following described land, in the county of ...., state of .... [here describe the land, or if you have only an interest in the land, instead of the words "am owner of" say "claim an interest in"] and that I have within the last .... days obtained knowledge that the following construction ["alteration" or, "repair"] has been commenced to be made [or "has been made" or, "is about to be made"] viz: [here describe it]. I hereby declare I will not be responsible for such construction, ["alteration," or "repair"]; that the same is done without my consent or authority, and that I will oppose any attempt to make the same a lien upon the land and premises above described.

....

Dated this .... day of ...., 18 ..

SEC. 6. Advertisement by mechanic to sell personal property under section fifteen (*ante*):

Auction Sale.

Notice is hereby given that I will expose for sale at public auction to the highest bidder [state particularly the time and place of sale] a certain wagon [or, other article—describe the article] which said wagon or other thing, was by ...., the owner thereof, left with me as wagon-maker [or, other artisan] to be repaired, on or about the .... day of ...., 18 ..; that I made the necessary repairs to said wagon [or, name the article] at the instance and request of said ....; that said repairs are justly and reasonably worth the sum of .... dollars, and were completed on the .... day of ...., 18 .., when said sum so became due to me from said ...., for said repairs; that the said ...., though requested, has not paid said sum or any part thereof, and said wagon has ever since the completion of said repairs and for more than .... months since the said work was done, been retained in my possession by virtue of my lien thereon for said repairs, and the proceeds of said sale are to be applied to the discharge of said lien, and of my costs of keeping and selling said property. ....

Dated .... day of ...., 18 ..

SEC. 7. The proprietors of stables and ranches or farms, shall have a lien on all live stock pastured, kept or fed, by them under contract with the owners thereof, for the amount and value of the care, feed or pasturage, of such live stock, and shall be entitled to recover and hold possession of such live stock until the amount of such lien shall be paid. Such proprietors shall have power to proceed and collect such debts and foreclose such liens in the same manner as other debts and liens are collected and foreclosed upon other personal property in civil actions. *Pub. Laws*, 1860, 723.

[Notice similar to last form (*ante* Sec. 6), using the words "proprietor of stable, ranch or farm," as the case may be, instead of the name of a trade, and describe the stock, and the character of keeping, and the place where the same were kept, will answer.]

SEC. 8. Possession of the goods is necessary to create the lien, and the right does not extend to debts which accrued before the character of factor commenced, nor where the goods do not in fact come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight. Possession is not only essential to the creation but also to the continuance of the lien. The receipt of a bill of lading by a factor to whom his principal is indebted, will not amount to constructive

possession of such goods, nor give a right of lien on them for the balance of accounts. The goods themselves must come to the factor's hands in order that the lien should attach, and the owner may prevent it from attaching either by selling the goods before this occurs to a third party or by revoking the factor's authority, and intrusting them to another person. 1 *Cal.* 80, 81.

SEC. 9. The master of a ship has a lien upon the goods shipped for the freight agreed to be paid thereon, and is not bound to part with any of them until the whole freight is paid. Offering to give or giving good security is not payment. Delivery of a part of the goods shipped to one consignee does not defeat a lien upon the remainder for the whole freight. The delivery of goods and the payment of freight are concurrent acts, and neither party is obliged to perform his part of the contract without the other being ready to perform the correlative act. The master cannot require payment without a readiness to deliver, and the consignee cannot demand delivery without a readiness to pay. 1 *Cal.* 44.

SEC. 10. The general principle is, that where the law compels a person—such as an innkeeper or common carrier, to take the care and custody of goods, he shall have a lien on the property for his reasonable and just charges therefor; and the same rule applies to a person who by his labor and skill has imparted an additional value to the goods. But one who merely provides food and takes the care of an animal, as an agistor or livery-stable keeper, has no lien on the property, unless there be a special agreement to that effect. An agistor of cattle is under no legal obligations to take the charge of or keep any cattle that may be brought to him for that purpose. He is at perfect liberty when he receives stock to keep or impose such terms and conditions as he may deem proper; and he may require an agreement that he shall have a lien upon the animals for his reasonable charges or for the agreed price, if he shall deem it necessary for his security. That class of bailees, however, who are required by law to take the charge and custody of and to keep animals for others, have no right to impose conditions upon those who employ them; and the law,

therefore, gives them a lien upon the property for their security. 23 *Cal.* 364, 365.

SEC. 11. If by the original contract made, the carriers waived any lien for freight, and instead of leaving their payment to the implication of law, they contracted to give a credit for the freight, then, whether they had parted with the possession or retained it, they must look only to the contract they had entered into for their security. Where it appears clearly from a charter party that the intention of the owner of the ship and the charterer is, that the former shall have no lien on the freight but shall give a personal credit to the charterer, the former loses his right of lien on the cargo, and can look only to the personal responsibility of the charterer for the payment of the hire of the vessel. 1 *Cal.* 420, 423.

SEC. 12. A right to detain goods until the freight thereon is paid grows out of the usage of trade. 1 *Cal.* 424.

SEC. 13. The vendor of real estate has an equitable lien on the land sold for the payment of the purchase money, even where the title has been fully conveyed, if he has taken no security for its payment; and the rights of a vendor who has not conveyed the title cannot be of less efficacy. It is but a just precaution on his part that he should withhold the title until the purchase money is fully paid, and the law will not deprive him of the only security which he has. His position is analogous to that of a mortgagee, and he may enforce his rights in the same manner. 2 *Cal.* 142, 143. A vendor of real estate who makes no conveyance, but gives a bond, conditioned for the execution of a conveyance on payment of the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of his lien. 4 *Cal.* 111.

CHAPTER LXIII.

STATUTE OF LIMITATIONS.

	SECS.		SECS.
STATUTE	1- 4	DECISIONS RESPECTING	5

Statute.

SECTION 1. Actions other than for the recovery of real property can only be commenced as follows:

Within five years: An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

Within four years: An action upon any contract, obligation or liability, founded upon an instrument of writing, except those mentioned in the preceding section.

Within three years: 1st. An action upon a liability created by statute other than a penalty or forfeiture. 2d. An action for trespass upon real property. 3d. An action for recovery of personal property. 4th. An action for relief on the ground of fraud—the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Within two years: 1st. Action upon a contract, obligation or liability, not founded upon an instrument of writing, and on an open account for goods, wares and merchandise, sold and delivered, and for any article charged in a store account. 2d. An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of of money collected upon an execution; but this section shall not apply to an action for an escape.

Within one year: 1st. An action upon a statute for a penalty or forfeiture, where the action is given to an individual or to an individual and the state, except where the statute imposing it prescribes a different limitation. 2d. An action for libel, slander, assault, battery or false imprisonment. 3d. An action upon a statute for a forfeiture or penalty to the people of this state. 4th. An action

against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

SEC. 2. In an action brought to recover a balance due upon a mutual, open and current, account where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

SEC. 3. An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.

SEC. 4. The above limitations shall apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties. *Gen. Laws*, 4359–4362.

SEC. 5. Statutes of limitation have been properly denominated "statutes of repose," because the law, for the purpose of preventing litigation, has wisely determined that there should be some period affixed beyond which a party ought not to be allowed to assert stale demands, and that the presumption of payment or of title ought to arise after he had neglected to assert his right for a certain length of time. These statutes are designed to affect the remedy and not the right or contract; they do not enter into the contract as a part of the law thereof. It would be inconsistent with sound morality and wise legislation to suppose that it was ever intended that when a party gave his obligation to pay a particular debt he was presumed to have had in his mind a particular period of time beyond which, if he protracted his obligation, his liability would cease. They have no retrospect beyond their passage. 7 *Cal.* 3–5.

SEC. 6. A mere naked receipt, in writing, acknowledging the delivery of money is not a contract, and does not import a promise, obligation or liability, and an action upon it is therefore barred by the statute of limitations in two years. A receipt or acknowledgment, in writing, for money, which also contains a clause stating that the money received is to be applied to the account of the person from whom received, partakes of the double nature of a receipt and contract, and shows upon its face a liability to account, and an action upon it is not barred by the statute of limitations until four years have expired. 24 *Cal.* 322.

SEC. 7. The statute of limitations requires an action on a judgment to be brought within five years; but when a judgment is rendered, payable in installments, the time begins to run from the period fixed for the payment of each installment as it becomes due. 23 *Cal.* 352.

SEC. 8. A foreign judgment is not "a contract, obligation or liability, for the payment of money, founded on an instrument of writing executed out of this state," within the meaning of the statute of limitations. The act of 1852 does not alter the time, as provided in the act of 1850, for commencing suits upon this class of liabilities. 4 *Cal.* 287.

SEC. 9. Judgments recovered in the courts of this state are within the first subdivision of the seventeenth section of the limitation act, and actions thereon are barred by the lapse of five years from the time they are rendered. 20 *Cal.* 211.

SEC. 10. Where accounts bear upon their face the words, "audited and approved," and certified to be correct, such words are sufficient to create them instruments of writing, within the meaning of the statute. Such instruments are not barred by that portion of the statute of limitations applying to accounts. 5 *Cal.* 57, 58.

SEC. 11. They are not intended to protect a party who has by fraudulent concealment delayed the assertion of a right against him until after the expiration of the period limited by the statute. All the exceptions specified in the statute which prevent its running are cases where a party is not in a situation to assert fully his rights. The reason of those exceptions would seem to apply with equal force to a case of fraudulent concealment. In all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the statute of limitations. The fraudulent concealment may be established by proof on the trial. If one is silent when he *should* speak, justice will compel him to silence when he *would* speak. 8 *Cal.* 458, 461, 467.

SEC. 12. Statutes of limitation do not act retrospectively; they do not begin to run until they are passed, and consequently cannot be pleaded until the period fixed by them has fully run since their passage. 6 *Cal.* 433. When plaint-

iff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest held by him for plaintiff until called for, there is a continuous trust, and the statute of limitations does not begin to run in favor of defendant until after demand made by plaintiff. *Baker* vs. *Joseph*, 16 Cal. 176.

SEC. 13. Where D. had a running account with L. from 1838 to 1849, at which time L. died intestate and no administration was had on his estate until 1857; and D. within one year after the granting of letters of administration commenced his suit on said account against the estate: *Held*, that the suit was commenced in time. The fact that a long period intervened between the death and the administration taken on the estate can make no difference. 10 *Cal.* 386.

SEC. 14. A note not due at the death of the maker was presented to the administrator of his estate March 5th, 1859, and rejected, and suit brought thereon March 12th, 1859—letters of administration having issued December 4th, 1856, and no notice to creditors to present their claims having been published: *Held*, that the note is not barred by the statute of limitations. The statute of limitations, as a rule, does not begin to run when no administration exists on the estate of the deceased at the time the cause of action accrued. The twenty-fourth section of the limitation act of 1850 applies only to cases where the statute has commenced to run. The object of this section is not to curtail but to prolong the period for suing in the given category. 19 *Cal.* 85.

SEC. 15. In actions brought on promises made by infants and ratified after they came of age, on promises which have been renewed after the statute of limitations has furnished a bar, and on unconditional promises by discharged insolvent debtors and bankrupts to pay debts from which they have been discharged, the plaintiff may declare on the original promise; and where infancy, the statute of limitations or a discharge in insolvency or bankruptcy, is pleaded or given in evidence as a defense, the new promise may be replied or given in evidence in support of the promise declared on; a replication alleging such new promise is not a departure

and evidence thereof is not irrelevant. A note, promise or debt, is not destroyed by a discharge in bankruptcy. If it were, it not only could not be renewed or revived, but could not be a consideration for a new promise. Yet nothing is clearer than that the old debt is a sufficient consideration for such promise. The new promise operates as a waiver, by the promisor, of a defense with which the law has furnished him against an action on the old promise or demand. 19 *Cal.* 484.

SEC. 16. The true theory of the statute is this: The acknowledgment or promise is incorporated with the terms of the original contract, and both taken together constitute a new contract. By the legitimate operation of the statute, the original debt is paid when the time fixed by the act expires. In making the original contract, the parties incorporated into it the terms of the statute, without any express stipulation to that effect. Under the terms of the contract as controlled by the existing law, the debt is paid by the failure of the creditor to sue within the time agreed upon; but the original debt being a good moral consideration is sufficient to support a new contract. 9 *Cal.* 92, 93.

SEC. 17. A part payment indorsed upon a promissory note, whether made before or after the expiration of the period fixed by the statute of limitations, does not avoid the bar of the statute. To take a contract out of the statute there must be an acknowledgment or new promise contained in some writing signed by the party to be charged thereby. 22 *Cal.* 100.

SEC. 18. It was formerly held that statutes of limitation proceeded upon a presumption of payment, and that the effect of an acknowledgment was to rebut this presumption and place the debt upon its original footing. This view is now exploded, and the statute is universally regarded as one of repose, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent. If two or more persons are bound, the same protection is afforded to each, and an acknowledgment by one is not available against another, unless he had authority to make it, either expressly given or resulting from the relation of the parties. The effect of the statute in this respect

is perfectly well settled, and it is immaterial, of course, whether the original liability was personal and direct or resulted incidentally from a charge upon property. In cases of personal liability, the doctrine as we have stated it, is conclusively established, and the principle is equally applicable where an attempt is made to enforce a security. 21 *Cal.* 502.

CHAPTER LXIV.

LIQUIDATION OF DAMAGES.

SECTION 1. The cases upon this subject—liquidated damages—are numerous, and it is difficult to deduce from them any certain and definite rule. In fact, the transactions of individuals are so various and the circumstances of many cases so peculiar, that no certain rule can be adopted for all cases. But, from the decisions, the following results seem to be substantially correct:

1st. When the party stipulates to pay a stated sum for a given period of time during the continuance of the failure, then the damages are to be considered as liquidated.

2d. When the agreement is not to carry on trade at a particular place, not to run a stage coach on a particular road, not to publish a rival newspaper, not to run a rival steamer on a particular route—in all these cases the sum stated must be taken as liquidated damages.

3d. When the party stipulates to marry no other person, to convey land or pay a named sum, the price of the land having been received by him, the damages are liquidated.

4th. When a named sum is to be paid for every acre of land ploughed up contrary to agreement; when a stated sum is to be paid for each article not delivered—the damages must be considered as liquidated.

5th. When the party stipulates to erect a building in a particular manner within a given time and upon failure to pay a named sum, it must be considered in the nature of a penalty. 9 *Cal.* 587.

SEC. 2. In general, a sum of money in gross, to be paid

for the non-performance of an agreement, is considered as a penalty. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims, to show that they were so considered by the contracting parties. 9 *Cal.* 588.

SEC. 3. Where the defendant stipulated that she would erect a brick building to cover such portion of a lot as would be satisfactory to plaintiff, and give him possession within three weeks; the plaintiff to have possession for six months, with the privilege of twelve months or more, and upon failure to perform the agreement she was to pay to plaintiff the sum of five hundred dollars damages—the case falls within the rule applicable to building contracts. There are several things for the defendant to do, a failure to perform any of which would have been a violation of the agreement. If the building had been erected upon a portion of the lot not satisfactory to the plaintiff, or the house not finished for a single day beyond the stipulated time, the defendant would have been liable for the whole sum, upon the theory that the sum named was liquidated damages. So, too, if the plaintiff had been disturbed in his possession for one day during the term of six months or denied the privilege of the additional term. There was no statement in the agreement that the sum was to be taken as liquidated damages. If the defendant had failed to erect a suitable brick building, although finished within the time specified, it would have been a violation of the contract. The damages mentioned were not liquidated, but a mere penalty to secure the performance of the contract, or the payment of such damages as the plaintiff might be entitled to under the circumstances. In building contracts, it may be difficult to say what amount of injury the plaintiff has sustained by reason of the non-completion of the building within the exact time stated. And yet this difficulty in ascertaining the amount of the injury occasioned by the delay has not induced the courts in such cases to consider the sum as liquidated damages. 9 *Cal.* 588.

SEC. 4. Plaintiffs purchased a bark of defendant, F., paid a portion of the purchase-money and entered into possession; at the time of the sale the vessel was sailing

under a coasting license issued to F., but was registered in the name of a third person. F. agreed to deliver to the plaintiffs within twenty days a good and sufficient title and register of the bark, and as security for the performance of this agreement, executed a bond in the penal sum of two thousand dollars. F. failed to deliver the title and register at the time agreed on or at any time, by reason of which failure the plaintiff was restricted in the lawful and usual use of the vessel: *Held*, that the sum specified in the bond should be considered as liquidated damages—it being one of those cases in which it is difficult, if not impracticable, to estimate the exact amount of damage suffered by the failure of the defendant to comply with his contract. 10 *Cal.* 517.

SEC. 5. S. sold to R. his butcher-shop, tools, etc., at Suisun, and in his contract of sale entered into this covenant with R.: "I also bind myself in the sum of five hundred dollars to said R. not to go into the butchering business in said Suisun, without the consent of said R., in any manner whatever": *Held*, that the five hundred dollars mentioned in the covenant are to be regarded as liquidated damages, and not as a penalty. The question whether a specified sum mentioned in a contract to be paid by either party, in the event of its violation, is liquidated damages or a penalty, must be determined by the intention of the parties, to be ascertained from a consideration of the whole contract. 25 *Cal.* 67.

CHAPTER LXV.

MANNER OF COMMENCING ACTIONS.

	SECS.		SECS.
How Actions shall be Commenced	1- 7	Form of Consent of Guardian of Infant Plaintiff	12
How Guardians Appointed	8- 9	Form of Nomination of Guardian by Infant Defendant	13
Form of Application of Infant Plaintiff for Guardian	10	Form of Consent of Infant Defendant	14
Form of Application of Relative of Infant Plaintiff	11		

How Actions shall be Commenced.

SECTION 1. Actions in justices' courts shall be commenced by filing a copy of the account, note, bill, bond or instrument, upon which the action is brought or a concise statement, in writing, of the cause of action, and the issuance of a summons thereon, within one year after the filing of the same, or by the voluntary appearance and pleadings of the parties, without summons. In the latter case the action shall be deemed commenced at the time of appearance. *Pub. Laws* 1870, 240.

SEC. 2. The cause of action must be filed with the justice before the issuance of the writ to give him jurisdiction of the case, as well where defendant appears and pleads as where he makes default. 4 *Eng.* 478.

SEC. 3. Where it is not filed until after the summons has been issued he can legally take no cognizance of it. 1 *Eng.* 41, 182, 371, 424.

SEC. 4. When a defendant pleads another suit pending between the same parties and for the same cause of action, and it appears that no summons was ever issued upon the complaint and that there was no voluntary appearance on the part of the defendant in such suit, there is no suit pending. 10 *Cal.* 233.

SEC. 5. The certificate of a justice on *certiorari*, that he delivered the summons in the suit to a constable on a certain day, does not show that he had legal evidence before him that the suit was commenced on that day; such delivery is no part of his official duty, and he cannot take notice thereof without evidence. 3 *Denio*, 12.

SEC. 6. To authorize a justice to enter an action by agreement of the parties without process, under the act for the trial of small causes, the plaintiff and defendant should appear before the justice to manifest their consent, or some person on behalf of the plaintiff having competent authority verified on oath before the justice. 5 *Halst.* 302.

SEC. 7. Putting in an answer, is an appearance; and such an appearance must be held to be a waiver of the mere formality of issuing a summons, the service of which in such case becomes unnecessary. The only purpose of the summons is to bring the defendant into court. It is constantly said by courts when actions are commenced by the service of process, as by *capias ad respondendum*, that a voluntary appearance waives all defects of process even when objection is taken in the same action. Under our practice, the plaintiff by filing his complaint goes himself into court and although he may not chose to take out a summons he cannot object to the defendant coming in and answering the complaint any more than he could object to the defendant's voluntary appearance after the plaintiff had taken out a summons which he did not choose to serve. Quite as little can the defendant in a collateral action object that there was no action pending after having voluntarily put in an answer to the complaint on file. 21 *Cal.* 55.

How Guardian Appointed.

SEC. 8. When a guardian is necessary he shall be appointed by the justice as follows:

1st. If the infant be plaintiff, the appointment shall be made before the summons is issued, upon the application of the infant if he be of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent, in writing, of the guardian to be appointed, and to be responsible for costs if he fail in the action, shall be first filed with the justice.

2d. If the infant be defendant, the guardian shall be appointed at the time the summons is returned or before the pleadings. It shall be the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the proposed guardian be present and consent, in

writing, to be appointed; otherwise, the justice may appoint any suitable person who gives such consent. *Gen. Laws*, 5470.

SEC. 9. The court has no right to appoint a guardian *ad litem* until the infant is properly brought into court. 9 *Cal.* 638.

Form of Application of Infant Plaintiff of the Age of Fourteen Years or upwards, for Guardian.

SEC. 10. The following is a form of application of infant for guardian:

In the justice's court of .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

To ...., one of the justices of the peace of said township:

The petition of ..... respectfully shows: That he desires to bring an action in said court against ...., and has filed therein his complaint [or, "copy of the instrument upon which the said action is to be brought," as the case may be].

That petitioner is an infant of the age of fourteen years [or, if the infant be more than fourteen, add, "and upwards, to wit: of the age of ....years"], and has no guardian, but .... has consented to be appointed guardian of petitioner, and has filed his consent, in writing, to be appointed such guardian, and to be responsible for costs if he fail in the said action.

Wherefore, petitioner prays that said .... be appointed guardian of petitioner for the purpose of appearing for him in said action.

[Date.] ....

Form of Application of Relative or Friend of Infant Plaintiff under the age of Fourteen Years, for Appointment of Guardian.

SEC. 11. The following is a form of application of relative of infant plaintiff for guardian:

In the justice's court of .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

To ...., one of the justices of the peace of the said township:

The petition of .... respectfully shows: That he is a relative [or, "friend," as the case may be], of .... That .... is about to bring an action in said court against ...., and the complaint [or, "copy

of the instrument upon which the said action is to be brought," as the case may be], has been filed in said court. That said .... is an infant of the age of .... years and has no guardian, but your petitioner [or, ".... ....," as the case may be], has consented to be appointed guardian of said infant, and has filed his consent in writing to be appointed such guardian, and to be responsible for costs if he fail in the said action.

Wherefore, petitioner prays that he [or ".... ...."] be appointed guardian of said infant, for the purpose of appearing for said infant in said action.

[Date.] ....

Form of Consent of Guardian to Infant Plaintiff to be Appointed.

SEC. 12. The following is a form of consent of guardian to infant plaintiff to be appointed:

In the justice's court of .... township, of the county of ...., state of ....

...., plaintiff,
against
...., defendant.

I hereby consent to be appointed the guardian of ...., the infant plaintiff in the above entitled action, and to be responsible for costs if he fail in the said action.

[Date.] ....

Form of Nomination of Guardian by Infant Defendant over Fourteen Years of Age.

SEC. 13. The following is a form of nomination of guardian by infant defendant over fourteen years of age:

In the justice's court of .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

To ...., one of the justices of the peace of .... township:

The petition of .... respectfully shows: That he is the defendant in the above entitled action, and the summons in said action has been returned; that he is an infant over the age of fourteen years, to wit: of the age of .... years and has no guardian; that ...., a friend of petitioner, is present and has consented to be appointed guardian of petitioner in said action and has filed such consent in writing, and petitioner hereby nominates said .... such guardian.

Wherefore, petitioner prays that said .... be appointed guardian of petitioner, to appear for him in said action.

[Date.] ....

Form of Consent of Guardian of Infant Defendant to be Appointed.

SEC. 14. The following is a form of consent of guardian of infant defendant to be appointed:

In the justice's court of .... township, in the county of ...., state of .

...., plaintiff, *against* ...., defendant.

To ...., one of the justices of the peace of .... township:

I hereby consent to be appointed the guardian of ...., the infant defendant in the above entitled action.

[Date.] ....

CHAPTER LXVI.

MINES AND MINING CLAIMS.

	SECS.		SECS.
LEGISLATION ON THE SUBJECT OF MINES	1- 3	HOW CONVEYED OR TRANSFERRED	32-42
CUSTOM AND USAGE	4- 8	HOW LOST	43
USE OF WATER FOR	9	ABANDONMENT	44-50
EXTENT OF RIGHT, OR CLAIM OF	10-12	WHEN PERFECTION TAKES PLACE	51-54
WORK DONE ON	13-15	PARTITION OF	55
RIGHTS OF MINERS AS AGAINST OTHERS	16-19	MINING PARTNERSHIP	56-58
ENTRY UPON PRIVATE LANDS	20-23	INJURY OR TRESPASS TO	59-62
HOW ACQUIRED	24-29	ACTIONS TO RECOVER POSSESSION OF	63
INCAPACITY OF TENANTS IN COMMON TO HOLD UNDER A COMPANY NAME	30	STATUTE OF LIMITATIONS	64
THE RIGHT TO GIVE AWAY A MINING CLAIM	31	FOREIGN MINERS	65
		ACT TO REGULATE THE RIGHTS OF THE OWNERS OF	66

Legislation on the Subject of Mines.

SECTION 1. According to the common law of England, mines of silver and gold are termed "royal mines," and are the exclusive property of the crown, and although the king grants lands and the mines which are in them, yet royal mines will not pass by so general a description. All mines of gold and silver within the realm, though in the lands of subjects, belong to the crown, and this right is accompanied with full liberty to dig and carry away the ores

and with all such incidents thereto as are necessary to be used for getting them. The several states of the union, in virtue of their respective sovereignties, are entitled to the *pura regalia* which pertained to the king at common law. New states are admitted into the union upon the same footing as the original states and possess the right of eminent domain, and the United States has no municipal sovereignty within the limits of the states. In reference to the ownership of the public lands, the United States only occupied the position of any private proprietor with the exception of an express exemption from state taxation. The mines of gold and silver on the public lands are as much the property of this state, by virtue of her sovereignty, as are similar mines in the lands of private citizens. She has, therefore, solely the right to authorize them to be worked, to pass laws for their regulation, to license miners and to affix such terms and conditions as she may deem proper to the freedom of their use. In her legislation upon this subject she has established the policy of permitting all who desire it to work her mines of gold and silver with or without conditions; and she has wisely provided that their conflicting claims shall be adjudicated by the rules and customs which may be established by bodies of them working in the same vicinity. 3 *Cal.* 225–227.

SEC. 2. This state has a large territory. Upon its acquisition by the United States, from the sparceness of its population, but a small comparative proportion of its land had been granted to private individuals; the great bulk of it was land of the government; but little, as yet, has been acquired by individuals by purchase. Our citizens have gone upon the public lands continuously from a period anterior to the organization of the state government to the present time. Upon these lands they have dug for gold, excavated mineral rock, constructed ditches, flumes and canals, for conducting water, built mills for sawing lumber and grinding corn, established farms for cultivating the earth, made settlements for the grazing of cattle, laid off towns and villages, felled trees, diverted water courses, and, indeed, have done in the various enterprises of life all that is usual and necessary in a high condition of civilized development. All of

these are open and notorious facts, charging with notice of them not only the courts who have to apply the law in reference to them, but also the government of the United States which claims to be the proprietor of these lands, and the government of the state within whose sovereign jurisdiction they exist. In the face of these notorious facts the government of the United States has not attempted to assert any right of ownership to any of the large body of lands within the mineral region of the state. The state government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them in some instances and recognized them in all. The parties to these acts have acquired rights. These rights rest upon the doctrine of presumption of a grant of right, arising either from the tacit assent of the sovereign or from expressions of her will in the course of her general legislation and, indeed, from both. Possession gives title only by presumption; then when the possession is shown to be of public land the possessor can protect his possession only upon the doctrine of presumption, for a license to occupy from the owner will be presumed. The state in her legislation upon this subject has established the policy of permitting all who desire it to work her mines of gold and silver with or without conditions. Yet there has never been any act of the legislature directly conferring the privilege of working the mines, except in cases of foreigners, who were required to obtain and pay for a license to do so. The general legislation of the state looking at the existence of this state of things, and referring to it, necessarily presumed a license—a license to every one who chose to possess himself of the franchise. The policy of this state, as derived from her legislation is, to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner. In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy, to license miners, to provide for the recovery of mining claims, recognizing canals and ditches which were known to divert the water of streams from their natural channels for mining pur-

poses, and others of like character. This policy has been extended equally to all pursuits, and no partiality for one over another has been evinced, except in the single case where the rights of the agriculturist are made to yield to those of the miner where gold is discovered in his land. This exceptional privilege is, of course, confined to public lands. The policy of the exception is obvious. Without it the entire gold region might have been inclosed in large tracts, under the pretense of agriculture and grazing, and eventually what would have sufficed as a rich bounty to many thousands would be reduced to the proprietorship of a few. Aside from this, the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land. That as the state has granted the franchise of digging gold, all of the incidents necessary to that purpose—wood, water, etc.—must follow, is certainly the doctrine of the common law, and would be decisive in the absence of any other right to contradict it. But there is nothing sufficiently expressive in the character of that legislation which warrants an interference with the already-acquired rights of individuals, except in the single case of agricultural lands. Therefore, the right to mine for the precious metals can only be exercised upon public lands; although it carries with it the incidents to the right, such as the use of wood and water, those incidents must also be of the public domain in like manner as the lands; a prior appropriation of either to steady individual purpose, establishes a *quasi* private proprietorship which entitles the holder to be protected in its quiet enjoyment against all the world but the true owner, except in the single case provided to the contrary by the statute—the case of agricultural lands. 5 *Cal.* 399; 14 *Cal.* 376.

SEC. 3. The whole course of legislation and judicial decisions in this state, since its organization, has recognized a qualified ownership of the mines in private individuals. Contracts affecting mining claims have been constantly enforced; remedies have been afforded to those whose possession has been disturbed or whose claims have been trespassed upon by others, and the right of the locator to sell,

hypothecate or in any manner dispose of, his property in mining claim, has been upheld as well by legislative enactment as by judicial decisions. 12 *Cal.* 70; 7 *Cal.* 327.

Custom, Usage.

SEC. 4. In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations, established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action. *Gen. Laws*, 621.

SEC. 5. At the time the foregoing law was enacted [April 29th, 1851] and became a part of the law of the land, there had sprung up throughout the mining regions of the state local customs and usages by which persons engaged in mining pursuits were governed in the acquisition, use, forfeiture or loss, of mining ground. [The word "forfeiture' is not here used in the common-law sense, but in its mining-law sense, as used and understood by the miners, who are the framers of our mining codes.] These customs differed in different localities, and varied to a greater or less extent according to the character of the mines. They prescribed the acts by which the right to mine a particular piece of ground could be secured, and its use and enjoyment continued and preserved, and by what new action on the part of the appropriator such right should become forfeited or lost and the ground become, as at first, *publici juris*, and open to the appropriation of the next comer. They were few, plain and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the legislature not only not to supplant them by legislative enactments, but on the contrary to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well-defined rules for their guidance applicable to the new conditions

by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results. Having received the sanction of the legislature, they have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form. These customs and usages have, in progress of time, become more general and uniform, and in their leading features are now the same throughout the mining regions of the state. 26 *Cal.* 532, 533.

SEC. 6. If a mining custom allows a person to locate a lode or vein for himself and others, by placing thereon a notice, with his own name and the names of those whom he may choose to associate with him, appended thereto, designating the extent of his claim; and one person thus locates a lode for himself and several others, some of whom have no knowledge of the location, the persons who have no knowledge of the location by the same become tenants in common with the locator and the others, and cannot be divested of their interest by the locators afterwards tearing down the notice and posting up another omitting their names, unless this is done with their knowledge and consent. 26 *Cal.* 527.

SEC. 7. The right of a mining claim upon the public lands rests upon possession only. 23 *Cal.* 178, 501; 20 *Cal.* 198; 10 *Cal.* 181.

SEC. 8. The owner of a mining claim has, in practical effect, a good vested title to the property, and should be so treated until his title is divested by the exercise of the higher right of the superior proprietor. His rights and remedies, in the meantime, are not trammeled by the consideration that the higher right to reclaim the property exists in another, which right may *possibly*, but will not *probably*, be exercised. His right to protect the property for the time being, under the peculiar circumstances of the case, is as full and perfect as if he was the tenant of the superior proprietor for years or for life. 7 *Cal.* 327.

Use of Water.

SEC. 9. Now, also, ever since the organization of the state, among the other various enterprises which have been

undertaken upon the public lands is that of the construction of ditches, flumes and canals, for the purpose of conducting waters from their natural channels to supply the wants of gold miners. In like manner as in other pursuits, the state government has looked on the progress of these works for the past seven years, until their extent has reached hundreds of miles, and every important stream in the state has been tapped by them; has referred to them in various legislative acts, and has annually made them the subject of revenue to the state. By the rule of presumption, a positive right exists in the constructors and owners of these works to hold and enjoy them as property—a vested right which cannot be taken away. They have a right to appropriate the water, to divert it from its natural channel, where no riparian rights intervened, and to be protected in its use, in its pure and natural condition, against all subsequent efforts to divert or injure it. This right, then, like that of digging gold, is a franchise; the attending circumstances raise the presumption of a general grant from the sovereign of this privilege, and every one who wishes to attain it has license from the state to do so, provided the prior rights of others are not interrupted. As, from the nature of these works, time is necessary to complete them, the license would be valueless if the right did not commence until their completion; and it must be presumed that in granting the license, the state did not intend it should be turned into so vain a thing, but designed it to be effectual for the object in view, and it consequently follows that the same rule must be applied here to protect this right as any other. 6 *Cal.* 558.

Extent of Right, or Claim of.

SEC. 10. The quantity of ground a miner can claim by location or prior appropriation for mining purposes may be limited by the mining rules of the district. The mining rules of the district cannot limit the quantity of ground or the number of claims a party may acquire by purchase. 18 *Cal.* 47.

SEC. 11. In the absence of mining rules regulating the subject of claims, their courses, distances, etc., the fact that

a party has located a claim bounded by another claim raises no implication or inference that the last-located claim corresponds in size or the direction of its lines with the former. 7 *Cal.* 42.

SEC. 12. Actual possession of a portion of a mining claim, according to the custom of miners in a given locality, extends, by construction, to the limits of the claim held in accordance with such customs. 3 *Cal.* 224.

Of Work done on a Claim.

SEC. 13. In the absence of any custom or local regulation, the right of property once attached in a mining claim, does not depend upon mere diligence in working such claim. The failure to comply with any one mining regulation is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with such of them as make a non-compliance a cause of forfeiture. It is not the making of improvements or expending of money on another's property which entitles the person so expending to hold the property as against the owner or even the improvements; but it is the fraud of the owner, who silently or otherwise, encourages the expenditure. But this fraud only exists, at the very most, where the owner knows that the other person is making the expenditures, and also knows that he makes them under the *bona fide* reasonable belief that he is the owner of the property. 12 *Cal.* 426.

SEC. 14. Where the regulations of a mining locality require that every claim shall be worked two days in every ten: *Held*, that the efforts of the owners of a claim to procure machinery for working the claim are, by fair intendment, to be considered as work done on the claim. So, also, is working on adjoining land in constructing a drain to enable the owners to work the claim. 9 *Cal.* 568.

SEC. 15. Work done outside of a mining claim, with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it. 12 *Cal.* 426.

Rights of Miners as against Others.

SEC. 16. *Injuring Crops or Buildings.*—No person shall, for mining purposes, destroy or injure any growing crops of grain or garden vegetables, growing upon the mineral lands of this state, nor undermine or injure any house, building improvement, or fruit trees, standing upon mineral lands and the property of another, except as hereinafter provided.

Miners to Give Bonds.—Whenever any person, for mining purposes, shall desire to occupy or use any mineral lands of this state, then occupied by such growing crops of grain, garden vegetables, fruit trees, houses, buildings or other improvements, property of another, such person shall first give bond to the owner of the growing crop, building, fruit trees or other improvement, to be approved by a justice of the peace of the township, with two or more sufficient sureties, in a sum to be fixed by three disinterested citizens, householders of the township, one to be selected by the obligor, one by the obligee and one by a justice of the peace of the township, conditional that the obligor shall pay the obligee any and all damages which said obligee may sustain in consequence of the destruction by the obligor or those in his employ, of the growing crops, fruit trees, improvements or buildings, of the obligee: *provided*, that the word "improvements" in this act shall be construed to mean any superstructure on said farm, ranch or garden, and nothing more.

Punishment for Violating.—If any person or persons shall violate the provisions of this act, he or they shall be deemed guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction, shall be fined in a sum not exceeding two hundred dollars nor less than fifty dollars, or by imprisonment in the county jail of said county not exceeding three months, either or both, at the discretion of the court: *provided*, nothing in this act shall prevent miners from working any mineral lands in the state after the growing crops on the same are harvested. *Gen. Laws*, 4646–4648.

SEC. 17. The state of California, as she had an undoubt-

ed right to do, by the act of April 11th, 1850, and the act of April 20th, 1852, passed laws regulating the manner of defending and possessing the public lands within her borders, and did define what lands may be possessed for agricultural purposes. By the provisions of those laws, lands containing any of the precious metals were expressly excepted, and the supreme court say a person who settles for agricultural purposes upon any of the mining lands of this state settles upon such land subject to the rights of miners, who may proceed in good faith to extract any valuable metals there may be found in the lands so occupied by the settler, in the most practicable manner in which they can be extracted and with the least injury to the claimant occupying the same. *McClintock* vs. *Bryden et al.*, 5 Cal. 97.

SEC. 18. The occupant of land may in every case rely upon his possession as against a mere trespasser, and the fact that the land is the public domain of the United States or land containing the precious minerals will afford no authority to strangers or third persons entering upon his possession, except in the cases allowed by statute. These cases are: First, where the land is used for grazing; and, second, for agricultural purposes. The legislature, in the wise exercise of its discretion, has seen proper to foster and protect the mining interest as paramount to all others. In permitting miners, however, to go upon public lands occupied by others, it has legalized what would otherwise have been a trespass, and the act cannot be extended, by implication, to a class of cases not specially provided for. The occupation of a lot for the purpose of hotel-keeping is not inconsistent with the policy of the state with regard to mining claims. The interests and wants of the mining communities demand that some facilities and accommodations should be afforded to the business of mining, and that persons settled in good faith upon lots in the mining towns and carrying on business should be reasonably protected and not left at the mercy of any malicious or irresponsible party who may choose to invade their possession upon the specious pretext of mining. 5 *Cal.* 309, 310.

SEC. 19. A party cannot, under pretense of holding land in exclusive occupancy, as a town lot, take up and inclose

twelve acres of mineral land in the mining district as against persons who subsequently enter upon the land in good faith for the purpose of digging for gold therein, and who, in such operations, do no injury to the comfortable use of the premises as a residence or for the carrying on of any mechanical or commercial business. 11 *Cal.* 12.

Entry upon Private Lands.

SEC. 20. The claim of a license from the state with reference to the mines, assuming that she possesses title to the mineral, is based on her affirmative acts and not on mere forbearance. By her legislation she has authorized the issuance of licenses to certain classes of persons; has provided for the introduction of proof of particular customs, usages and regulations, in actions respecting mining claims; has levied taxes upon canals and ditches constructed for the express purpose of conducting water to be used in mining for gold, and, in a great variety of instances, has expressed her recognition of a license in the miner to use whatever right she possessed. But this license, very justly inferred from the general course of her legislation, is restricted to the public lands. This has been expressly adjudged by this court in repeated instances. In *Stokes* vs. *Barrett* (5 Cal. 36), the court said: "We held, in the case of *Hicks et al.* vs. *Bell et al.*, that the mines of gold and silver in this state were the property of the state, and that the policy of her legislation permitted all persons to work for these metals. We did not in that case intend to go further than to decide the right of all citizens to dig for gold upon the public lands; for although the state is the owner of the gold and silver found in the lands of private individuals as well as the public lands, yet to authorize an invasion of private property in order to enjoy a public franchise would require more specific legislation than any yet resorted to. 14 *Cal.* 376.

SEC. 21. Under the laws of this state, any citizen of the United States may enter upon and hold an amount of the public domain, whether within the mineral districts or not, or whether containing mines or not, not exceeding one hundred and sixty acres. He has the right to occupy and im-

prove it, cultivate the soil, plant orchards and vineyards, and apply it to such uses as he may deem most advantageous to himself. But his possession of the land for the common usual purposes of grazing and agriculture, is subordinate to the right of the miner, who, when acting in good faith, has the right to enter upon any tract of land held by another merely for agricultural or grazing purposes, and to mine the same, doing no more injury to the premises than may be necessary to enable him to work the mine in the most practicable manner. The policy of this state is "to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner." *Tartar* vs. *The Spring Creek Water and Mining Company*, 5 Cal. 395. This right of possession is exclusive of all others, except the miner, who has the right to enter upon any tract of mineral land which may be occupied by another, merely for agricultural or grazing purposes, and to locate his mining claim thereon, according to the usage and custom of miners; to pass and repass over the land in going to and from his claim; to dig up the soil, sink shafts, run tunnels, and do all other acts necessary and proper to enable him to work his claim efficiently, being careful to do no unnecessary injury to the land. Such, in general terms, are the rights of the miner; but these rights are subject to limitations and restriction, necessary to prevent an interference with rights of property vested in others, and which are entitled to equal protection with his own. Thus he has no right to use water to work his mine which has been appropriated to other legitimate purposes. *Irwin* vs. *Phillips*, 5 Cal. 140; *Tartar* vs. *The Spring Creek Water and Mining Company*, 5 Cal. 395. Nor has he a right to dig a ditch to convey water to his mine over land in the possession of another. *Burdge* vs. *Underwood*, 6 Cal. 45; *Weimer* vs. *Lowry*, 11 Cal. 104. Nor can he mine land used for a residence and for purposes connected therewith (*Fitzgerald* vs. *Urton*, 5 Cal. 308), or land used for houses, orchards, vineyards, gardens and the like. *Smith* vs. *Doe*, 15 Cal. 101; *Gillan* vs. *Hutchinson*, 16 Cal. 153. In *Smith* vs. *Duval*, (15 Cal. 101), the court say: "It must not be understood,

however, that, within the limits of the mines, all possessory rights and all rights of property, not founded upon a valid legal title, are held at the mercy and discretion of the miner. Upon this subject it is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should undoubtedly be protected; as also growing crops of every description, for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character, and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and upon every principle of legal justice are entitled to the protection of the courts." As was said in the case of *Tartar* vs. *The Spring Creek Water and Mining Company*, "the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land." In that case, as also the case of *Clark* vs. *Duval* (15 Cal. 85), the court recognize the common-law principle that the grant of the right to mine carried with it all the incidents necessary to that purpose; that this included the use of the land and such elements of the freehold and inheritance as wood, water and the like, as were necessary for mining purposes. But in the former case the court expressly say that "there is nothing sufficiently expressive in the legislation of the state which warrants an interference with the already acquired rights of individuals, except in the single case of agricultural lands. So in *Stokes* vs. *Barrett* (5 Cal. 36), the court say that "to authorize an invasion of private property in order to enjoy a public franchise would require more specific legislation than any yet resorted to." And in *Gillan* vs. *Hutchinson* (16 Cal. 153), it was held that the legislature had no power to take the property of one person and give it to another, and therefore the act of 1855 giving the miner the right to dig up an orchard, vineyard, garden and crop of growing grain, by tendering the owner a bond for the payment of all damages, was held invalid. Such are some of the principles which this court has laid down in determining the numerous questions which have arisen be-

tween the occupant of the public lands and the miner. While the rights of the latter have been sedulously guarded, the court have been equally careful to protect the rights of the former from invasion. 25 *Cal.* 452–454.

SEC. 22. A person entering upon and possessing public lands, under the possessory act of April 20th, 1852, holds the land subject to the right of any person to enter upon it, and work the mines of precious metals therein. Where the miner, who desires to dig up crops growing on land held under the possessory act, offers to give the proper bond required by the act of 1855, and the owner of the crops refuse to receive it, the miner acquires by such offer a right to enter and mine on the land, and cannot be treated as a trespasser. The miner is liable, however, for the damage to the growing crops caused by his act, and if the owner of the crops should demand of the miner payment of the damage caused to the crop, and the miner should refuse to pay, a court of equity would restrain him from further working. 23 *Cal.* 552, 453.

SEC. 23. Miners have no right to enter upon private land and subject it to such uses as may be necessary to extract the precious metals which it contains. 14 *Cal.* 460.

How Acquired and Held.

SEC. 24. One party may locate ground in the mineral districts for fluming purposes, and another party at the same or a different time may locate the same ground for mining purposes—the two locations being for different purposes will not conflict. A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another and his mining right may be subject to this prior right of deposit, but the claim of the miner will not be subject to those who come after him. 9 *Cal.* 589–591.

SEC. 25. The right in a mining claim rests upon the taking in accordance with local rules. 12 *Cal.* 431.

SEC. 26. The mode of acquiring and the extent of a mining claim must be in conformity with the local rules of miners. 12 *Cal.* 534. They are held by possession, but that possession is regulated and defined by usage and local

conventional rules, and the actual possession which is applied to agricultural land, and which is understood to be a *possessio pedis*, can scarcely be required in a mining claim in order to give a right of action for the invasion of it. The claim must be in some way defined, as to limits of course, before the possession of, or working upon, part gives possession to any more than that part so possessed or worked. But when the claim is defined and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim. And so if a party enters, *bona fide*, under color of a title, as under a deed or lease, the possession of part as against any one but the true owner or prior occupant is the possession of the entire claim described by the paper—and this though the paper did not convey the title. The condition of the possessor in such instances would not be worse than that of the occupant of other real estate, in which case this rule applies. A third person would have no right to invade the possession of the party taking it under such circumstances, and set up as against him outstanding title in a stranger with which he had no connection. This principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture or abandonment, etc., but the case, we suppose, is of a possession taken independently of such rules. 17 *Cal.* 43.

SEC. 27. A patent from the United States for land in California, issued upon a confirmation of claims held under grants of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain. Where individuals convey lands the minerals of gold and silver pass, unless expressly reserved. 17 *Cal.* 199.

SEC. 28. Possession of mining ground, acquired by an entry under a claim for mining purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied with actual occupancy of a part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, although such acts of appropriation are not done in accordance with any local mining rule. The exclusion, therefore, of evidence tending to prove a posses-

sion of this character, is error. Although mining ground may be located in the absence of local regulations, yet the extent of such location is not without limit. The quantity taken must be reasonable; and whether it be so or not will be determined in such cases by the general usages and customs prevailing upon the subject. If an unreasonable quantity be included within the boundaries the location will not be effectual for any purpose, and possession under it will only extend to the ground actually occupied. Upon the question of reasonableness of the extent of a mining location, a general custom, whether existing anterior to the location or not, may be given in evidence; but a local rule stands upon a different footing, and cannot be introduced to affect the validity of a claim acquired previous to its establishment. 20 *Cal.* 198, 199.

SEC. 29. The public mineral lands of this state are open to the appropriation of any one, and the one first occupying any portion of the same makes it his by the act of occupancy; and once his, it continues his, until he manifests his intention to part with it in some manner known to the law. 24 *Cal.* 339.

Capacity of Tenants in Common to Hold under a Company Name.

SEC. 30. Several persons owning a tract of mining claims as tenants in common and acting under a company name, have not the capacity to take or hold, in the name of the company, the interest of any one or more of the tenants in common by forfeiture. Tenants in common of a tract of mining claims, acting under a company name, are incapable, in the company name, of taking and holding mining claims by grant or by any other means by which title to real estate would pass. 25 *Cal.* 230.

The Right to Give Away a Mining Claim.

SEC. 31. If the possession of the occupant be continued in another by the expression of a wish or desire of the occupant to another that he succeed to the possession, and he thereupon takes possession, a gift is the result—there is no vacancy in the possession and consequently no abandonment. A mere wish or desire of the occupant when he

leaves the possession that another may next occupy, without being communicated to that other person and assented to by him, and accompanied by a transfer of possession, does not amount to a gift. 24 *Cal.* 339.

How Conveyed or Transferred.

SEC. 32. The owner of a mine has, in addition to the right of exclusive possession and enjoyment, the right of absolute disposition, and may sell, transfer or hypothecate, without let or hindrance from any one. Contracts for the sale of such interests have been frequently recognized and enforced by the courts. 9 *Cal.* 142.

SEC. 33. The occupant of mineral lands may part with his interest by selling it or giving it to another, or by any other mode authorized by law or he may abandon it. 24 *Cal.* 339.

SEC. 34. The purchaser of a mining claim can only acquire, by such purchase, such right or title as his vendor had at the time of sale. 11 *Cal.* 366.

SEC. 35. The right to a mining claim upon the public lands rests upon possession only, and a sale by parol by one in possession, accompanied by a transfer of possession, transfers the title. 23 *Cal.* 178.

SEC. 36. A written conveyance is not necessary to the transfer of a mining claim. The right to mining ground, acquired by appropriation, rests upon possession only; and rights of this character, not amounting to an interest in the land, are not within the statute of frauds, and no conveyance other than a transfer of possession is necessary to pass them. Thus, where the owners of a mining claim, previously located by themselves and others, became incorporated and placed the corporation thus formed in possession of the claim as their successor in interest, with the evident intention that whatever rights the unincorporated individuals had should pass to the corporation: *Held*, that the title to the claim passed to the corporation as effectually as it would if the transfer had been accompanied by a conveyance, in writing. 20 *Cal.* 198.

SEC. 37. The rule allowing mining claims to be transferred by a verbal sale and delivery of possession, only ap-

plies to cases where the grantor is in actual possession and can deliver possession to the grantee, and does not extend to cases where at the time of the sale the claim is in the adverse possession of third parties. In such cases there must be a written conveyance to pass the title. 25 *Cal.* 18.

SEC. 38. A *bona fide* parol sale of a mining claim, accompanied by a delivery of possession, is valid as against a subsequent sale of the same grantor made by deed, in writing, duly acknowledged. The possession of one claiming under a parol sale or unrecorded bill of sale, in order to impart notice to a subsequent purchaser, need not be evidenced by an actual inclosure or anything equivalent thereto. 23 *Cal.* 575.

SEC. 39. The mere passive acquiescence of the other partners or tenants in common in a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee. 11 *Cal.* 367.

SEC. 40. Conveyances of mining claims may be evidenced by bills of sale or instruments in writing, not under seal, signed by the person from whom the estate or interest is intended to pass, in the presence of one or more attesting witnesses; and also all conveyances of mining claims heretofore made by bills of sale or instruments in writing, not under seal, shall have the same force and effect as *prima facie* evidence of sale as if such conveyances had been made by deed under seal: *provided*, that nothing in this act shall be construed to interfere with or repeal any lawful local rules, regulations or customs, of the mines in the several mining districts of this state; and, *provided* further, every such bill of sale or instrument in writing shall be deemed and held to be fraudulent and void as against all persons except the parties thereto, unless such bill of sale or instrument in writing be accompanied by an immediate delivery to the purchaser of the possession of the mining claim or claims therein described, and be followed by an actual and continued change of possession thereof or, unless such bill of sale or instrument in writing shall be acknowledged and recorded as required by law in the case of conveyances of real estate. *Gen. Laws*, 706.

SEC. 41. Instruments conveying mining claims need not be under seal. 23 *Cal.* 347.

SEC. 42. Mining claims may be conveyed by bills of sale or instruments in writing not under seal, and such conveyances have the same force and effect as *prima facie* evidence of sale as if made by and under seal. 26 *Cal.* 264.

How Lost.

SEC. 43. A right to hold and work a mining claim, when acquired, may be lost by a failure or neglect to comply with the rules and regulations of the miners, relative to the acquisition and tenure of claims in force in the bar or diggings where the claim is located; and if such rules and regulations are not complied with by those holding claims in the district, the ground becomes once more open to the occupation of the next comer. 26 *Cal.* 264.

Abandonment.

SEC. 44. Abandonment, in its common-law sense, is purely a question of intention. An abandonment takes place when the ground is left by the locator without any intention of returning or making any future use of it, independent of any mining rule or regulation. 26 *Cal.* 264.

SEC. 45. Where an abandonment is sought to be established by the act of the party, the intention above governs; and if such party leave a mining claim, with the intention not to return, his abandonment is as complete if it exist for a minute or a second as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years: *provided*, there was no rule, usage or custom, of miners of such a notorious character as to raise a presumption of an intention to abandon. 11 *Cal.* 366.

SEC. 46. An abandonment can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself, and regardless and indifferent as to what may become of it in future. When an abandonment takes place a vacancy in the possession is created, and without such vacancy no abandonment can take place. 24 *Cal.* 339.

SEC. 47. The place of deposit of tailings must be claimed

as such or as a mining claim, and the intention of the claimant must be manifested by outward acts. The rights of others being concerned, the intention not to abandon is not sufficient alone to sustain the right. Although the intention not to abandon the right, may in fact exist, and may be susceptible of clear proof, still the party may fail for want of a clear manifestation of that intent. 9 *Cal.* 245.

SEC. 48. The mingling of the tailings from different claims does not give a stranger any right to the mixed mass. It may be a circumstance to prove the intention of those who permitted them to be thus mingled, so as to show an abandonment. But this is the extent to which such a fact can go. If A can have a right to a place of deposit, B may have also; and if they can have such right separately, they can mix their property if they please so to do. If parties voluntarily mix their property this does not give a mere stranger any right to the mixture. The parties hold in common. 9 *Cal.* 245.

SEC. 49. The failure to perform the amount of work on a mining claim, required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon it may be occupied and appropriated by another. 26 *Cal.* 309.

SEC. 50. The law will not presume an abandonment of property in a dam and ditch for mining purposes from the lapse of time. 10 *Cal.* 181.

When Forfeiture Takes Place.

SEC. 51. The term "forfeiture," as used in our mining customs and codes, means the loss of a right previously acquired to mine a particular piece of ground, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated. 26 *Cal.* 264.

SEC. 52. Where a forfeiture is claimed under a mining regulation or custom, this regulation or custom will be most strictly construed against the claim of forfeiture. 23 *Cal.* 245.

SEC. 53. Where a forfeiture of an interest in a mining claim, for non-payment of assessments, is claimed under an

agreement entered into by all the tenants in common owning the same, the parties claiming the benefit of the forfeiture must show an exact compliance on their part with all the conditions in the agreement, or they will not be entitled to the forfeiture. In order to have a forfeiture take place there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues. 25 *Cal.* 230.

SEC. 54. Possession of one partner or tenant in common of a mining claim is the possession of all. Where the tenant in common or partner goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment; nor does his refusal to pay or delay in paying the expenses of the business or assessments create of itself a forfeiture. In order to the enforcement of the forfeiture of the interest in the claim, some appropriate action by suit must be taken to liquidate the demand and sell the property, or there must be at least clear and unequivocal proof of abandonment. 11 *Cal.* 366, 367.

Partition of.

SEC. 55. Where a mining claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common or as coparceners or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants the same as other real property. The mere fact that a mining claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners, where the answer does not set up and it is not shown that a suit in equity is necessary to settle the accounts and adjust the business of the partnership. 23 *Cal.* 501.

Mining Partnership.

SEC. 56. All written contracts of copartnership for mining purposes upon the lands of the United States within this state, formed by two or more persons, shall be subject to the conditions and liabilities prescribed by this act. Any member of a copartnership or his successor in interest

in any mining claim, who shall neglect or refuse to pay any assessment, or shall neglect to perform any labor or other liability incurred by the copartnership agreement may, after the expiration of sixty days after such assessment, labor or other liability, has become due, be notified, in writing, by any remaining partner or partners, or by his or their agents, that such assessment, labor or liability, is due, which written notice shall specify the name of such mine and the districts wherein it is located, and shall particularly mention the liability which has been incurred; and if such delinquent reside within the state he shall be personally served with such notice; and if the person so notified shall refuse or neglect for thirty days after service of such written notice to comply with the requirements of the copartnership agreement, the remaining partner or partners may sell the interest of such delinquent partner in and to such mining claim. All sales under the provisions of this act shall be at public auction and by giving five days' notice thereof by posting written notices in three public places within the mining district where such mine is located. The notice shall also specify the extent of the interest to be sold and the name of the delinquent partner or partners, and the time and place of such sale, which place shall be within the district where the mine is located. The purchaser at such sale shall acquire all the rights and title of the delinquent partner. If any delinquent partner in any mine is absent from the state or resides in any other state or territory, the notice to such delinquent shall be by publication once a week for four months in some newspaper published in the county where the mine is located; or, if there be no newspaper in the county then such notice shall be published in some newspaper in an adjoining county. After the expiration of the time of such publication the interest of such delinquent shall be sold in the manner prescribed in this section. *Gen. Laws*, 4649–4652.

SEC. 57. Where the several owners of a mine unite and co-operate in working the same, they form a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has some rules peculiar

to itself. One of these rules is, that each owner has a right at any time to sell and convey his interest, and such sale does not dissolve the partnership. Another of these rules is, that the law does not, in case of a mining partnership, imply any authority, either to a member of such partnership or to its managing agent, to bind the company or its individual members by a promissory note or a contract of indebtedness executed in the name of the company; but it is incumbent on the party claiming to hold the company for such indebtedness to show that the person executing or contracting the same in the name of the company had power and authority to do so. 23 *Cal.* 199.

SEC. 58. Where a mining company, not incorporated, forms a trading partnership with an individual under a firm name, each member of the mining company is a member of the firm. Where one of the mining company was actively engaged in the business of the partnership as salesman, it cannot be pretended that he was a dormant partner, whose acts would not bind the firm. 6 *Cal.* 163, 164.

Injury or Trespass to.

SEC. 59. The possession of agricultural land is *prima facie* proof of title against a trespasser, but where it is shown that the party goes on mineral lands to mine, there is no presumption that he is a trespasser, and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge* vs. *Smith*, 14 Cal. 383; *Coryell* vs. *Cain*, 16 Cal. 573. In this state, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from government to the first appropriator. This presumption, though of no avail against the government, is held absolute in such controversies. *Coryell* vs. *Cain*, 16 Cal. 572.

SEC. 60. Where two mining claims adjoin each other, and the owners of one claim work across the dividing line and take away gold-bearing earth from the other claim, the

fact that they did so in ignorance of the location of the dividing line is no excuse or justification, and it is error to admit evidence of such ignorance as an excuse for the trespass or in mitigation of damages. 23 *Cal.* 306.

SEC. 61. There is no doubt that the owners of a ditch would be liable for wanton injury or gross negligence, but not for a mere accidental injury where no negligence was shown. In such cases, the maxim "*sic utere*," etc., must be construed with reference to the rights of all the parties concerned, and no man can be deprived of the due enjoyment of his property and held answerable in damages for the reasonable exercise of a right. 7 *Cal.* 340.

SEC. 62. The plaintiffs are the owners of certain mining claims, situated in the bed or channel of a stream known as "Missouri Cañon." The defendants own claims in the same stream, above and adjoining those of the plaintiffs. The claims of the defendants were first located. The complaint alleges that the defendants wrongfully constructed a flume upon the claims of the plaintiffs, and deposited thereon a large quantity of tailings from claims above, and that the plaintiffs were greatly injured and damaged thereby. The answer admits the construction of the flume and the deposit of tailings, but denies that these acts were wrongful, and avers that the flume was constructed by the defendants for the purpose of working their claims; that its construction was proper and necessary for that purpose, and thal the deposit of tailings was occasioned by the ordinary working of these claims. There is no dispute as to the facts. On the trial of the case the court instructed the jury, among other things, that a person first locating a mining claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet, from the usual mining operations above, becomes obstructed, he may open the same; and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as the same can be constructed without considerable damage to claims subsequently located. The real question in the case, as shown by the defense to which we have referred, and by this instruction of the court, is, whether the defendants, as a matter of absolute legal right,

regardless of the ownership of the plaintiffs, and irrespective of any local custom or regulation upon the subject, were entitled to an easement upon the plaintiffs' claims for the purposes mentioned in the answer. Upon this question we readily confess that our convictions are decidedly adverse to the position of the defendants. We do not see upon what legal foundation the right claimed by them can possibly rest. As a proposition of law, the right of one person for his own advantage to enter upon and use the property of another without his consent, cannot be maintained. The doctrine of necessity invoked by the defendants, and relied upon by the court below, has no application. Under certain circumstances, a person may have a right of way by necessity over the land of another; but the doctrine that one person may have a right by necessity to go upon the land of another and erect thereon buildings or other structures, we are by no means prepared to recognize. The fact that the land is a mining claim can make no difference, for the principle is the same, whatever is the character of the property. If the acts of the defendants were authorized by any local custom or regulation, its existence should have been averred and proved. Our opinion is, therefore, that the acts of the defendants were without any sufficient justification, and that the court erred in its view of the law as given to the jury. The defendants had unquestionably the right to work their claims, but the same right belonged to the owners of every other claim on the stream, and the fair and reasonable enjoyment of this right was secured by the guarantee and protection of the law. The channel of the stream was the natural and necessary outlet for all, and no one had, as against the others, the right to its exclusive use for that purpose. The recognition of such a right would be in violation of every principle of law and justice. It certainly could not be vindicated upon the principle *qui prior est tempore, patior est jure*, as that principle is legally understood and applied. The true rule undoubtedly is, that each person mining in the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein; and the maxim *prior tempore patior jure* can only be invoked where there is

such a conflict of rights that one of the parties must necessarily yield. It can never be applied in excuse or justification of a trespass. The right of a miner to be protected in the exclusive possession of his claim is as perfect and absolute as that of any other person to be protected in the possession of his land or any other property which he may own. But where from the situation of different claims in the same stream the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of a fair and reasonable exercise of the right which every claimant has to work his claim, it will be *damnum absque injuria*, and will furnish no cause of action to the party injured. What is a fair and reasonable exercise of this right is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. 15 *Cal.* 142, 143.

Actions to Secure Possession of.

SEC. 63. In actions respecting miners' claims in a justice's court, the justice shall have power upon application of the party out of possession of the claim or claims, after notice of one day to the adverse party, to appoint a receiver of the proceeds of the claim pending the action. If the parties agree upon a person he shall be appointed such receiver. If the parties do not agree, the justice shall appoint a receiver, who shall take an oath, which shall be filed with the justice, that he is not interested in the action between the parties, and that he will honestly keep an account of all gold dust or metals of any kind, the proceeds of the claim or claims in dispute. After the appointment of such receiver, the justice shall have power to issue a written order to any sheriff or constable to put such receiver into possession of such claim; which order said sheriff or constable shall execute, and the receiver shall remain in possession of the claim or claims so long as said action may remain undetermined in any court. The court in which the action may be pending shall have authority, upon application of either party with two days' notice to the other, from time to time, to make such orders for the disposition of the proceeds of such claim or claims for the safety of the same

as may seem proper. The court in which the action may be pending shall also have power, upon application of the receiver, based upon his affidavit, to punish as for contempt all persons who have been guilty of disturbing the receiver in the possession of the claim. The receiver mentioned in this section shall keep an accurate account of all the proceeds of the claim pending action, and of all amounts paid out for working the same, and shall retain the proceeds and pay the same over, pursuant to the order of the court. The receiver shall also be required, on demand of either party, to give security for the faithful performance of his trust, and shall be allowed for the same a reasonable compensation, to be paid out of the proceeds of the claim in his hands, but in no case exceeding ten per cent. upon such proceeds. *Gen. Laws*, 5579, 5580.

Statute of Limitations.

SEC. 64. No action for the recovery of property in mining claims or for the recovery of the possession thereof, shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within two years before the commencement of this action. No cause of action or defense to an action founded upon the title to property in mining claims or to the rents or profits out of the same shall be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor, of such person was seized or possessed of the premises in question within two years before the commencement of the act in respect to which such action is prosecuted or defense made. *Gen. Laws*, 4382, 4383.

Foreign Miners.

SEC. 65. The state has the power to require the payment by foreigners of a license fee for the privilege of working the gold mines in the state. 1 *Cal.* 232.

An Act to Regulate the Rights of the Owners of Mines.

SEC. 66. An act to regulate the rights of the owners of mines, approved March 9th, 1870, provides as follows:

1st. The owner or owners of mines or mining claims in this state shall have a right of way, for ingress and egress, for all necessary purposes, over and across the land or mining claims of others, as hereinafter prescribed.

2d. Whenever any mine or mining claim shall be so situated that it cannot be conveniently worked without a road thereto or a ditch to convey water thereto, or a ditch or cut to drain water therefrom, or without a flume or tunnel thereto, or a place whereon to dump or deposit tailings, and such road, ditch or drain or such flume or tunnel, shall necessarily pass over, across or through or under, and such place of deposit be upon mining claims or other lands owned or occupied by others, then shall such first-mentioned owner or owners be entitled to a right of way for such road, ditch, drain, flume or tunnel, over, across or through, or under or to, such place of deposit upon such other mining claims or lands, upon compliance with the provisions of this act.

3d. Whenever the owner or owners of any mine or mining claim shall desire to work the same, and it is necessary, to enable him or them to do so conveniently, that he or they should have a right of way, for any of the purposes mentioned in the foregoing sections, or that he or they should have a place for dumpage and deposit of tailings, as mentioned in the preceding section, and such right of way or place of deposit shall not have been acquired by private agreement between him or them and the owners or occupants of the claims or lands, over, across, under or upon, which he or they seek to establish such right of way or place of deposit, then it shall be lawful for him or them to present to the county court or to the county judge, if the court be not in session, of the county wherein such mine or claims are situated, a petition, praying that such right of way or place of deposit be awarded to him or them. Such petition shall be verified and shall contain a particular description of the character and extent of the right sought; a description of the mine or claims of the petitioners and of the claims or lands to be affected by such right or privilege, with the names of the owners or occupants thereof. It shall also show that such right or privilege has not been acquired by private agreement or contract between the re-

spective parties, and shall conclude with a prayer for the allowance thereof by the court or judge, and the appointment of three commissioners to assess the damages resulting from such allowance.

4th. Upon the receipt of such petition and the filing thereof in the office of the clerk of the county court, the court or judge, as the case may be, shall direct a citation to issue under the seal of the court, to the owners named in the petition of mining claims or lands to be affected by the granting of such right or privilege, requiring them and each of them to appear before such court or the judge thereof, if the court be not in session, on a day therein named, which shall not be less that ten days from the service thereof, and show cause why such right or privilege should not be awarded or allowed and such commissioners appointed, as prayed for. Such citation shall be served on each of the parties therein named, in the manner prescribed by law for the service of summons in ordinary proceedings at law.

5th. Upon the day named in the citation or upon any subsequent day to which the hearing may be adjourned, the county court or the county judge, if the court be not in session, shall proceed to hear the allegations and proofs of the respective parties, and if satisfied that the claims of the petitioners can only be conveniently worked by means of the right of way, privilege or place of deposit, prayed for, shall make an order adjudging and awarding to such petitioners such right of way, privilege or place of deposit, and appointing three disinterested persons, residents of the county, as a commission to assess the damages resulting to the owners of mining claims or lands affected thereby.

6th. The commissioners so appointed, being duly sworn, shall proceed without delay to examine the mine or claims of the person or persons petitioning, as well as the mining claims or lands to be affected by the right or privilege prayed for. They may also hear testimony relative to the value of such mining claims or lands and the damages resulting from such right or privilege, and report, in writing, the result of their inquiries to the court or judge appointing them. Such report shall designate the course or line

and dimensions of the road, ditch, drain, flume or tunnel, as the case may be, or the place of deposit prayed for. It shall further designate the value of the lands to be occupied by or appropriated to, and for such right of way or place of deposit, and assign the damages which each of the owners or occupants of mining claims or lands affected by such right or place of deposit shall suffer in consequence thereof.

7th. Within ten days from the filing of such report any of the parties concerned in the same may move, for cause shown by affidavit, to set aside the same; and if upon hearing of such motion, such court or judge shall set aside or vacate such report, a new commission shall be appointed which shall proceed in all respects as is provided for the first commission. If no motion to set aside the report of the first or any succeeding commission be made, as provided in the last section, or if being made it is denied, then the same shall be regarded as final and an order shall be made by the court or judge in pursuance thereof.

8th. Upon the payment of the sum assessed as damages to each of the owners or occupants of claims or lands to whom the same shall have been awarded by the report and order mentioned in the preceding section, then the person or persons petitioning shall be entitled to the right of way or place of deposit, as designated and defined by such report, over or upon the land or claims of the person or persons receiving such compensation, and he or they may, upon making such payment, proceed to occupy the line, route, way or place of deposit, so designated, and to erect thereon such works and structures and make such excavations as may be necessary to the use and enjoyment of the right of way or place of deposit so awarded.

9th. Whenever the owner or owners of any mine or mining claim are desirous, in working the same, to carry off the tailings and other refuse matter through and along any watercourse, ravine or natural outlet, which is in whole or in part owned or occupied by other persons, for mining or other purposes, then such first-mentioned owner or owners may proceed in the manner hereinbefore provided to have such right and privilege awarded to him or them: *provided*, nevertheless, that the county court or judge shall not make such

award or appoint a commission unless such court or judge shall be satisfied that the right or privilege sought can be enjoyed without especial injury to those owning or occupying claims or lands along or upon such watercourse, ravine or outlet.

10th. All costs and expenses shall be paid by the party making the application, and the commissioners appointed shall receive five dollars per day for each day actually engaged in the service.

11th. This act shall take effect from and after its passage. *Pub. Laws*, 1870.

CHAPTER LXVII.

MORTGAGE PLEDGE.

	SECS.		SECS.
PLEDGES, GENERALLY	1- 2	FORM OF CHATTEL MORTGAGES	11
DISTINCTION BETWEEN A PLEDGE AND CHATTEL MORTGAGE	3- 9	MORTGAGE OF REAL ESTATE	12-14
STATUTE IN REGARD TO CHATTEL MORTGAGES	10	FORM OF MORTGAGE OF REAL ESTATE	15

Pledges, Generally.

SECTION 1. Pledges are, in general terms, voluntary submissions of property belonging to a debtor as security for the payment of money.

SEC. 2. This submission may be, technically, a pledge or a mortgage of personal or real property.

SEC. 3. The chief distinction at common law between a pledge and chattel mortgage was, that in a pledge the title did not pass to the pledgee, who held only a lien on the property, and in all cases the possession must accompany the pledge, whilst in a chattel mortgage the title of the mortgagee became absolute at law on the default of the mortgagor, and it was not essential to the validity of the instrument that possession of the mortgaged property should be delivered. It is apparent, therefore, that while the general office to be performed by each is the same—to wit: to secure the payment of money or the performance of some other act—the consequences resulting from a failure to per-

form are widely different. In the case of a pledge, the title remains in the pledgeor, after condition broken, with a right to redeem at any time before a sale of the property; and if the property be sold by the pledgee, in satisfaction of his demand, he cannot become the purchaser at his own sale. But in the case of a chattel mortgage the title of the mortgagee becomes absolute at law on the default of the mortgagor, and on the foreclosure of the mortgage, the mortgagee is at liberty to become the purchaser at his own sale. 36 *Cal.* 444.

SEC. 4. The mortgagee of personal property has two remedies when default is made. He may resort to a court of equity to foreclose the mortgagor's right to redeem or to compel a redemption, or he may sell the property at a fair public sale, after due notice to the mortgagor. The notice to be given must be, as to time, a reasonable notice, and it must plainly indicate the time and place. All the circumstances—such as the class of property, the season of the year, the locality; as, whether it be in a densely- or sparsely-settled community—will suggest what notice will be reasonable. 27 *Cal.* 258.

SEC. 5. A mortgage of personal property passes the present legal title in the property itself to the mortgagee, subject to be revested in the mortgagor, his heirs or assigns, upon the performance by him or them of an express condition subsequent. Such is the effect of a mortgage of personal property at law; but in equity, under proper circumstances, the mortgagor may redeem even after non-performance of the condition. 8 *Cal.* 150.

SEC. 6. The following is one of the clearest cases of a mortgage of personal property, as distinguished from a pledge: A sold B three horses for two hundred dollars and gave him a regular bill of sale, but at the same time B gave to A a writing, engaging, on the payment of the two hundred dollars in fourteen days, to return the horses to A. The money was not paid at the time agreed upon and the title to the property became absolute in B, and a subsequent tender of the money by A and demand of the property did not entitle him to maintain trover for it. 8 *Cal.* 150.

SEC. 7. In the case of a mortgage of personal property, the title being in the mortgagee, the risk of loss is also with him. In the case mentioned in the preceding section, had the horses died or had they been stolen within the fourteen days, the loss would have fallen on B; and as A did not pay the money within the time limited, the property became absolute in B, and A was not liable to B for the two hundred dollars. In cases of mortgages of personal property, if the mortgagee relies upon his legal rights and insists that the property becomes his absolutely, the mortgagor will be discharged from all further liability upon the mortgage debt, unless there is something special in the case. But it is different in the case of a pledge. The pledgee has a lien upon, not the legal title to, the property. It is taken as security, and the legal title remains in the pledgeor. If any loss occur, it falls upon him. If the debt to secure the payment of which the pledge is made be not discharged when due, the pledgee does not obtain an absolute title to the property. He then has a right to sell the pledged property and pay himself from the proceeds; if they are not sufficient to discharge the debt entire, the pledgeor remains liable for the deficiency, and if they are more than sufficient, the pledgee is responsible for the surplus. 8 *Cal.* 151.

SEC. 8. If the note of a third person is deposited by a debtor with his creditor, as collateral security for a debt, it is a pledge, and the ownership remains in the pawnor. The authority of the creditor with respect to the note can extend no further than to receiving the money due upon it without first calling upon the debtor, in some way, to redeem. The money, when received, would be a substitute for the note, and to be held upon the same terms and subject to the same rights and duties as the note. 8 *Cal.* 152.

SEC. 9. Where a lease is assigned as security for the payment of a note, it is a pledge and not a mortgage. The pledgee does not take the legal title by the assignment or by failure of the pledgeor to pay the note, but he has the right to collect the rents and apply them on the note, and is responsible for the surplus. A pledgee has no right to sell until after demand and notice; and if he sells without

demand and notice to a party having full knowledge of his title, no absolute title passes, and the property remains in the hands of the purchaser as a pledge. 8 *Cal.* 145.

SEC. 10. It should be remembered that a chattel mortgage, under the act of 1857 and the amendment of 1861, is of no validity except between the parties thereto, unless the provisions of the act are strictly complied with, which may be summed up as follows:

1st. It must be confined to upholstery and furniture and used in hotels and public boarding-houses, when mortgaged to secure the purchase-money of the identical articles mortgaged, and not otherwise. Saw-mill, grist-mill and steamboat, machinery, tools and machinery used by machinists, foundrymen and other mechanics, steam boilers, steam engines, locomotives, engines and the rolling stock of railroads, printing presses and other printing material, instruments and chest of a surgeon, physician or dentist, libraries of all persons, machinery and apparatus for mining purposes.

2d. To give such mortgage legal effect (except as between the parties thereto), unless the residence of the mortgagor and mortgagee, their profession, trade or occupation, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage, and the mortgagor and mortgagee shall made affidavit that the mortgage is *bona fide* and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage. *Gen. Laws*, 498.

3d. The mortgage must be recorded in the county where the mortgagor lives, and also in the county or counties where the property is located or used: *provided*, that property *in transitu* from the possession of the mortgagee to the county of the residence of the mortgagor or to a location for use shall, during a reasonable time for such transportation, be considered as located. *Gen. Laws*, 500.

4th. If the mortgagee retains the actual possession of the property he may omit the recording of his mortgage during the continuance of his possession of it. *Gen. Laws*, 501.

Nothing in the above act [in relation to chattel mortgages] shall be construed to apply to or shall affect in any manner

any bill of sale, mortgage, hypothecation or conveyance, of any vessel which is or shall be duly recorded in the office of the collector of customs of the place where such vessel is registered or enrolled pursuant to the laws of the United States. *Pub. Laws*, 1867–8, 111.

Form of Chattel Mortgage.

SEC. 11. The following is a form of chattel mortgage:

This indenture, made the ....day of ....., in the year of our Lord one thousand eight hundred and ...., between ...., residing at ....., county of ...., state of ...., and by profession, trade or occupation, a ...., the party of the first part, and ...., residing at ...., county of ...., state of ...., and by profession, trade or occupation, a ...., the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ..... dollars, ... of the United States, to me in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over, unto the said party of the second part, all those certain goods and chattels, now being in ...., state of ...., and described as follows, to wit: [particularly describe the property].

To have and to hold all and singular the said goods and chattels above bargained and sold or intended so to be, unto the said party of the second part, ... executors, administrators and assigns, forever:

Provided, nevertheless, and these presents are upon this express condition, that if the said party of the first part .... executors, administrators or assigns, shall well and truly pay unto the said party of the second part .... executors, administrators or assigns, the sum of .... dollars .... of the United States, on the .... day of ...., A. D. 18.., at the .... of ...., in the county of ...., state of ...., and shall further pay in .... of the United States unto the said party of the second part, ... executors, administrators or assigns, interest upon the said principal sum at and after this date, at the rate of .... per cent. per ...., on the .... day of ...., at said .... of ... , in the said county of ...., then these presents shall be void. But in case default shall be made in the payment of the said principal sum or any one of the said installments of interest, then it shall and may be lawful for, and the said party of the first part does hereby authorize and empower the said party of the second part, ... executors, administrators or assigns, with the aid and assistance of any person or persons, to enter.... dwelling-house, ... store and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods and chattels, and sell and dispose of the same, for the best price they can obtain by due process of law, or by agreement between the parties of this mortgage, their executors, administrators or assigns, which agreement shall be entered on the record of the mortgage, and out of the money arising therefrom to retain and pay the said sum above-mentioned, and interest as aforesaid, and all charges touching the same, and counsel fees, not to exceed

... per cent. upon the full amount which shall then be due, rendering the overplus, if any, unto the said party of the first part, or to .... executors, administrators or assigns. And until default be made in the payment of the said sum of money, the said party of the first part, executors, administrators and assigns, may remain and continue in the quiet and peaceable possession of the said goods and chattels, and in the full and free use and enjoyment of the same.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

.... [L.S.]

Signed, sealed and delivered, in the presence of

....

State of ....., county of ..... } ss.

...., of the county of ...., being .... duly sworn,.... says, that he is .... the mortgagor named in the foregoing mortgage, and that the said mortgage is *bona fide* and made without any design to defraud or delay creditors.

....

Subscribed and sworn to before me, this .... day of ....., A.D. 18..

....

State of ....., county of ..... } ss.

...., of the county of ...., being .... duly sworn .... says, that he is the mortgagee named in the foregoing mortgage, and that the said mortgage is *bona fide* and made without any design to defraud or delay creditors.

....

Subscribed and sworn to before me, this .... day of ....., A.D. 18..

....

[If there be any agreement as to the manner in which the mortgaged goods are to be converted into money, other than by "due process of law," said agreement must be entered on the record of the mortgage.]

SEC. 12. At common law, a mortgage of real estate vested the legal title in the mortgagee, subject to be defeated by the performance of the condition subsequent. But this theory is entirely changed by our system, and the legal title remains with the mortgagor, subject to be divested by a foreclosure and sale. And, where regularly sold, the purchaser obtains whatever title was in the mortgagor at the instant of time when he executed the mortgage. 9 *Cal.* 125.

SEC. 13. Mortgages at the present day are considered as merely securities for the payment of money, and no breach of their conditions can possibly vest the title in the mortgagee. 2 *Cal.* 492, 493.

SEC. 14. A conveyance of real estate, conditioned to be void on the payment of a given sum of money on a given day, otherwise to be and remain in full force and virtue, is a mortgage and not a conditional sale. 4 *Cal.* 102.

Form of Mortgage of Real Estate.

SEC. 15. The following is a form of mortgage of real estate:

This indenture, made the .... day of ...., in the year of our Lord one thousand eight hundred and ...., between .... and ...., the party of the second part, witnesseth, that the said party of the first part, for in consideration of the sum of .... dollars, ... of the United States of America, to .... in hand paid, do .... grant, bargain, sell, convey and confirm, unto the said party of the second part and to .... heirs and assigns forever, all that certain [here describe the property]. Together with all and singular the tenements, hereditaments and appurtenances, thereto belonging or in any wise appertaining.

This conveyance is intended as a mortgage, to secure the payment of the note of which the following is a copy [here copy the note], and these presents shall be void if such payment be made. But in case default be made in the payment of the principal or interest as .... provided, then the said party of the second part, his executors, administrators and assigns, are hereby empowered to sell the said premises with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, to retain the said principal and interest, together with the cost and charges of making such sale [here, if such be the agreement, you may insert the payment of fees of attorney]; and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part and his heirs or assigns.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

.... [L.S.]

Signed, sealed and delivered, in presence of

.....

CHAPTER LXVIII.

NEW TRIALS.

	SECS.		SECS.
NEW TRIAL DEFINED	1- 3	DISQUALIFICATION OF JUROR	32
SURPRISE AS A GROUND FOR A NEW TRIAL	4- 8	DEFENDANT NOT LIABLE	33
UNPREPAREDNESS	9-10	THE MOTION	34-35
EXCESSIVE DAMAGES	11-12	AFFIDAVIT ON MOTION FOR	36-39
VERDICT NOT SUSTAINED BY EVIDENCE	13	NOTICE OF MOTION FOR	40-41
CONFLICTING EVIDENCE	14-16	STATEMENT ON MOTION FOR	42-43
NEWLY-DISCOVERED EVIDENCE	17-25	COURT MAY IMPOSE TERMS	44
IMPROPERLY-ADMITTED EVIDENCE	26-29	RULES TO BE OBSERVED ON APPLICATION FOR	45
EVIDENCE GIVEN BY MISTAKE	30-31	EFFECT OF GRANTING A NEW TRIAL	

New Trial Defined.

SECTION 1. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referees. *Pr. Act*, 192.

SEC. 2. A new trial may be granted by the justice, on motion, within ten days after the entry of judgment for any one of the following causes:

1st. Accident or surprise, which ordinary prudence could not have guarded against.

2d. Excessive damages, appearing to have been given under the influence of passion.

3d. Insufficiency of the evidence to justify the verdict or other decision.

4th. Newly-discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the time. *Pr. Act*, 622.

SEC. 3. The power to grant new trials is one exclusively of discretion—a legal discretion. 2 *Cal.* 182; 22 *Cal.* 82; 3 *Cal.* 59; 16 *Cal.* 358. The terms upon which a court will grant a new trial is also a matter of discretion, which is usually exercised in reference to the conduct, management and peculiar circumstances, of the trial. 13 *Cal.* 54. Nor will the consent of parties to an action, after trial, that a

new trial be granted, divest a court of its discretion. If it were otherwise, parties would have it in their power to continue litigation indefinitely. 15 *Cal.* 90.

Surprise as a Ground for a New Trial.

SEC. 4. Mere surprise at the evidence of the witnesses of the defendant is not sufficient. Under such circumstances a nonsuit should have been submitted to before verdict. 7 *Cal.* 40. Unless a party has been misled by previous statements of a witness of the adverse party as to what he would swear to, his testimony, when given, though it may surprise, is no ground for a new trial. 6 *Cal.* 228. If testimony be given at a trial which relates to a point not necessarily involved in the decision of the action, even though it be false, unless it had some influence on the judgment, is no ground for a new trial; but if false testimony, given by mistake or otherwise, may have influenced the verdict, particularly if ordinary prudence could not have avoided it, a new trial should be granted. 21 *Cal.* 397; 3 *Cal.* 114; 19 *Cal.* 29; 24 *Cal.* 237.

SEC. 5. An affidavit of a party that he was surprised at the admission of a witness on the trial because his attorney had advised him that the witness was incompetent, and that he was also surprised by the testimony of the witness in stating a certain conversation incorrectly, is not sufficient to authorize the granting of a new trial on the ground of surprise. 22 *Cal.* 160.

SEC. 6. Where a party to an action, previous to the trial of the same, is told by a witness that he will testify in a certain manner in relation to a fact material to the issue, and the party to whom the declaration is made, relying on the same, neglects to procure other testimony, and secures the attendance of the witness, and when called to the stand the witness, either by collusion with the party against whom he is called or by reason of any fact or occurrence for which the party calling him is not responsible, testifies contrary to what he had previously stated he should do—this is a surprise in the sense in which that word is used in the law of new trials, and a new trial will be granted, provided the party applying for the same shows that he will be

able on the new trial to supply the testimony required. In such case it is not necessary for the party surprised to move for a continuance at the time. 24 *Cal.* 85.

SEC. 7. Surprise at the ruling of the court, on the trial, as to the admission of testimony, is not ground for a new trial. 10 *Cal.* 523.

SEC. 8. And where, in such case, plaintiffs were permitted to prove and recover on a title other than the one set up, it was error in the court below to refuse a new trial, the motion for which was based on affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. 16 *Cal.* 87.

Unpreparedness.

SEC. 9. A party who is unprepared for trial at the time of the calling of the case should move for a continuance; and if he fail to do this, he waives his want of preparation, and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. 11 *Cal.* 21.

SEC. 10. The parties must come to trial prepared, at their peril; and if either party has any good excuse for not being prepared, he is entitled of right to a postponement of the trial. It has, therefore, been repeatedly *held*, that the subsequent allegation of a party that he was not prepared, is no reason for granting a new trial, unless it be founded on a discovery of testimony of which the party was not at the time apprised. 11 *Cal.* 22.

Excessive Damages.

SEC. 11. The power of the court to grant a new trial on the ground of excessive damages is seldom exercised. This results as much from the paucity of cases in which such a complaint is made as from the indisposition of judges to interfere with the measure of damages which results from the deliberation of a jury; but there occasionally occur cases in which even this diffidence on the part of courts of law is totally overcome by the gross inconsistency of the verdict in its relation to the facts. 5 *Cal.* 411.

SEC. 12. In such case the verdict will not be disturbed, on motion for a new trial, unless the amount is so large as to induce a reasonable person, upon hearing the circumstances, to declare it outrageously excessive or as to suggest, at the first blush, passion or prejudice or corruption, on the part of the jury. *Wheaton* vs. *N. B. and M. R. R. Co.*, 36 Cal. 590.

Verdict not Sustained by Evidence.

SEC. 13. Where the verdict of the jury is clearly against the evidence, a new trial will be awarded. 8 *Cal.* 159. On motion for a new trial, on the sole ground that the verdict is not sustained by the evidence, the court below, in passing on the motion, cannot disregard any portion of the evidence before the jury. The question as to the competency of the evidence cannot be raised on such motion. A verdict obtained upon incompetent evidence may be set aside; but this cannot be done if the evidence were admitted without objection, nor can it be done upon the ground that effect was given to the evidence by the jury, even if objected to. In such cases, that which vitiates the verdict is the error of the court in admitting the evidence, and if the party seeking to set aside the verdict be not in position to take advantage of this error, he cannot object that the evidence was improperly admitted. *McCloud* vs. *O'Neall*, 16 Cal. 397.

Conflicting Evidence.

SEC. 14. Where the evidence is conflicting a new trial will not be granted. 23 *Cal.* 219.

SEC. 15. Where the proofs are conflicting it is not error to refuse a new trial. 13 *Cal.* 58.

SEC. 16. Where the evidence is conflicting the granting or refusing of a new trial rests in the discretion of the court. 10 *Cal.* 301. If the finding of the court is contrary to the weight of evidence, yet if there is some evidence that sustains the finding, the judgment will not be disturbed by the appellate court. *Lick* vs. *Madden*, 36 Cal. 208.

Newly-discovered Evidence.

SEC. 17. Newly-discovered evidence, which is merely cumulative, affords no ground for a new trial. 23 *Cal.* 419.

SEC. 18. The discovery of new evidence, which is merely cumulative, affords no ground for a new trial. 24 *Cal.* 512.

SEC. 19. In cases of conflicting testimony, newly-discovered evidence, merely cumulative, is no ground for a new trial. 6 *Cal.* 228.

SEC. 20. A new trial will not be granted because of the discovery of new evidence which is merely cumulative and which, if produced, would only tend to contradict a witness of the opposing party. 22 *Cal.* 160.

SEC. 21. A new trial will not be granted on the ground of newly-discovered evidence which is merely cumulative and going to contradict the witnesses of the other party. 7 *Cal.* 40.

SEC. 22. Motions for new trial on the ground of newly-discovered evidence regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required. This is especially true when the new testimony is to impeach a witness on the trial or is merely cumulative. The party must show by his own affidavit that he did not know of this evidence and could not by due diligence have obtained it; the affidavit of a witness is not sufficient. [In this case the party himself was present.] *Baker* vs. *Joseph*, 16 Cal. 180.

SEC. 23. The last assignment involves the question of the denial of the motion for a new trial on the ground of newly-discovered evidence. Applications for this cause are regarded with distrust and disfavor. The temptations are so strong to make a favorable showing after a defeat in an angry and bitter controversy involving considerable interests, and the circumstance that testimony has just been discovered when it is too late to introduce it, that courts require the very strictest showing to be made of diligence and all other facts necessary to give effect to the claim. Especially is the rule held in its strictness when the new testimony is to impeach a witness on the trial or is merely cumulative. So it is said by *Graham and W. on New Trials* (Vol. 1, 4782): "The party applying on the ground of newly-discovered evidence must make his diligence apparent, for if it is even left doubtful that he knew of the evidence he will not succeed in his application." The affidavit of

Joseph shows no compliance with this rule. He must show by his own affidavit that he had not this knowledge and could not by due diligence have obtained it. The affidavit of a witness is not enough. In this case the affidavit of Joseph seems to ignore the exercise of diligence in procuring this testimony now professed to have been discovered. Much must be left to the discretion of the judge in passing upon these applications. 16 *Cal.* 176.

SEC. 24. A new trial on the ground of newly-discovered evidence should not be granted where such evidence is entirely cumulative, and if the evidence is that of a witness whose deposition was used on the trial, it would be a dangerous practice to admit such witness to come in after a verdict and patch up his testimony, particularly where the verdict shows that the jury disbelieved his first statement. It is reasonable to believe that he disclosed at least all he knew in his first deposition, and no greater latitude should be allowed in such a case than there would be had the witness been actually present and examined on the trial. 5 *Cal.* 342.

SEC. 25. Where, during the progress of a trial, the existence or the materiality of absent evidence is first discovered, the party desiring such evidence should move for a continuance until it can be obtained, and, failing to do this, he cannot have a new trial on the ground that the evidence was newly discovered. 22 *Cal.* 160.

Improperly-admitted Evidence.

SEC. 26. The admission by the court, under the objection of defendants, of improper evidence offered by plaintiff to prove a fact alleged in his complaint and not denied in the answer, is no cause for granting a new trial. 21 *Cal.* 215.

SEC. 27. If the court errs in the admission of testimony during the trial, but afterwards instructs the jury to disregard such testimony, the error is not sufficient to entitle the party objecting to the testimony to a new trial. 25 *Cal.* 504.

SEC. 28. A new trial will not be granted on account of the admission of improper evidence to prove a fact not

material to the decision of the action, and independent of which the verdict is supported. 21 *Cal.* 220; 20 *Cal.* 437.

SEC. 29. If improper evidence is permitted to be given to the jury, a new trial will be granted, unless the court can see that such evidence could have had no influence upon the verdict. 1 *Cal.* 93.

Evidence Given by Mistake.

SEC. 30. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. 9 *Cal.* 568.

SEC. 31. In passing upon applications for a new trial, much must be left to the discretion of the judge below; and we interfere reluctantly with the exercise of that discretion. Two affidavits were made by the witness Archibald—the last some months after the first, and after the time for filing affidavits or statements on the motion had elapsed. The court was not bound to receive this last affidavit, and should not have considered it unless some good reason were shown. But it was not bound, after having received it, to give it conclusive effect, especially as the affidavit is not definite as to the fact of mistake in the testimony on the trial. A very clear showing of mistake by the witness as to a material fact deposed to by him should be made to induce the court to grant a new trial on this ground, and then it should appear that the mistake was injurious to the party, and that he had no means or had used due diligence to counteract the mistake or to correct it. In a long and severely-litigated case, with many witnesses, it would scarcely ever happen that some one of them would not be willing to depose that his language when on the stand needed some qualification, or that his memory was confused or uncertain as to some fact to which he had sworn without properly qualifying his statements. It would be a premium for importunity and improper acts—though there is no suspicion of such a course here—to hold that a new trial should be granted whenever a witness was willing to qualify the statements he had made on the stand. At any rate, we would not be justified in holding that the court below erred in refusing to grant a new trial for the cause assigned. 17 *Cal.* 388.

Disqualification of Juror.

SEC. 32. A new trial should not be granted upon affidavit that one of the jurors "knew and was aware of the circumstances connected with that affair"—the alleged assault and battery—prior to being summoned as a juror. Such knowledge would not disqualify a juror. 1 *Cal.* 38.

Defendant not Liable.

SEC. 33. Where, as a question of law, it is beyond dispute that the defendant is not liable and the court might well have granted a nonsuit or instructed the jury to bring in a verdict for the defendant, a new trial should be granted. 3 *Cal.* 420.

The Motion.

SEC. 34. The motion for a new trial is an affirmative proceeding—the burden of maintaining the propriety of granting which is cast upon the party moving; and there is no more reason why the moving party should not attend in such a case, by himself or counsel, upon the court, when the motion is brought up for hearing, than there is that a plaintiff should be absent when his case is first called, and expect, if it be dismissed, to avail himself of errors he may assign on appeal. Having abandoned his motion by his own default, the defendant cannot bring the merits of the motion here by appeal. 15 *Cal.* 44.

SEC. 35. The application shall be made upon affidavit and notice. The affidavit shall be filed with the justice, with a statement of the grounds upon which the party intends to rely. The adverse party may use counter-affidavits on the motion, provided they be filed one day previous to the hearing of the motion. *Pr. Act*, 623.

Affidavit on Motion for.

SEC. 36. The affidavit for a new trial upon the ground of newly-discovered evidence, should affirmatively show that the evidence claimed to be newly discovered was discovered since the trial, in what particular such evidence was material, what important fact it would tend to establish, that due diligence was used, why it could not with reasonable

diligence have been discovered and produced at the trial of the cause. 3 *Cal.* 114.

SEC. 37. On a motion for a new trial on the ground of newly-discovered evidence, the affidavit of one of the defendants as to what an absent witness will testify is insufficient. It should be accompanied by the affidavit of the witness himself. The absence of the witness and the consequent inability of the defendant to obtain the affidavit in time is not a sufficient excuse for its non-production. If necessary, application should be made to the court for additional time to obtain and file it. 11 *Cal.* 199.

SEC. 38. In an affidavit for a new trial, the allegation of the affiant that "as he is informed and believes the damages assessed were excessive and more than could be recovered on a fair trial of the action," is insufficient as a statement of a meritorious defense upon which to justify any disturbance of the verdict. The facts should be stated from which the court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim. 19 *Cal.* 29.

SEC. 39. It is not error for the court to exclude affidavits filed on a motion for a new trial which are written in a foreign language. 23 *Cal.* 419.

Notice of Motion for.

SEC. 40. On motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial. The object of the notice was accomplished without it. 9 *Cal.* 76.

SEC. 41. A justice cannot after judgment grant a new trial without notice, and in the party's absence. Any subsequent action in the presence of the party—his objection on the above ground being overruled—is void, and, therefore, only the first judgment can be appealed from. 11 *Ind.* 335.

Statement on Motion for.

SEC. 42. In a statement for a new trial, the evidence may be simply referred to and need not be contained in the statement itself. 9 *Cal.* 211.

SEC. 43. The court may refuse a new trial, provided the successful party will consent to a reduction of his judgment. 8 *Cal.* 294.

Court May Impose Terms.

SEC. 44. The court may impose terms in granting or refusing a new trial. In requiring a *remittur* [*remittitur*] of a portion of the judgment as terms for refusing a motion for a new trial, the court uses a sound and admitted discretion. It is only saying, that although the verdict is excessive, yet had it been so much less it would not be excessive. By the reduction, the action of both court and jury is made to coincide *pro tanto* against the defendant, and where that is the case, the result of the coincidence ought to be the measure of the judgment. 4 *Cal.* 383.

Rules to be Observed on Application for.

SEC. 45. There are three distinct steps recognized by the practice act in a proceeding to obtain a new trial, for the taking of each of which, except the last, a particular period of time is allowed: 1st. A notice of intention to move for a new trial. 2d. Filing and serving statement or affidavit. 3d. The motion for a new trial. 27 *Cal.* 337.

SEC. 46. An order extending the time for taking either of these steps should express with precision the object to be obtained. 27 *Cal.* 337.

SEC. 47. When the statute speaks of notice of motion, it means written notice. 12 *Cal.* 448.

SEC. 48. A notice of intention to move for a new trial may be extended by the court thirty days. 27 *Cal.* 113.

SEC. 49. The statute prescibing the practice in motions for new trials is plain and simple. The moving party prepares his statement and submits it to the opposite party. If satisfactory to him, they add a certificate, which they sign. If not, he proposes amendments and submits them to the moving party, and if they are accepted by him, the statement is then engrossed accordingly, and to the engrossed copy a certificate is added and signed by them, to the effect that the statement is correct and agreed to by them. If they cannot agree, the statement and proposed

amendments are submitted to the judge, who allows or denies according to circumstances. After the judge has thus determined what shall constitute the statement, it is engrossed accordingly, and a certificate added to the effect that it is correct, and if not signed by counsel must be signed by the judge. Nothing can be regarded by the supreme court as a statement which is not authenticated in one of these modes. 30 *Cal.* 510.

SEC. 50. Evidence not bearing on the points stated should be excluded. 27 *Cal.* 107.

SEC. 51. Where the merits of the case were not investigated in the lower courts by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the practice act relating to interventions, the supreme court awarded a new trial, although the decision of the court below upon the main question involved was approved, and the only error disclosed might have been cured by a direction to modify the judgments. 21 *Cal.* 280.

Effect of Granting a New Trial.

SEC. 52. Granting new trial vacates the judgment. An order vacating a verdict or finding and granting a new trial, necessarily vacates the judgment in the case resting on such verdict or finding. 28 *Cal.* 527; 34 *Cal.* 624.

CHAPTER LXIX.

NONSUIT.

	SECS.		SECS.
STATUTE	1	MOTION FOR, SHOULD STATE GROUNDS	9
IT IS A QUESTION OF LAW	2		
WHEN, SHOULD BE GRANTED	3–8		

Statute.

SECTION 1. An action may be dismissed or a judgment of nonsuit entered in the following cases:

1st. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional remedy has been allowed, the un-

dertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2d. By either party, upon the written consent of the other.

3d. By the court, when the plaintiff fails to appear on the trial and the defendant appears and asks for the dismissal.

4th. By the court, when upon the trial and before the final submission of the case, the plaintiff abandons it.

5th. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly. *Pr. Act*, 148.

It is a Question of Law.

SEC. 2. The granting of a nonsuit on the facts is a question of law. 13 *Cal.* 40.

When it shall be Granted.

SEC. 3. A justice may nonsuit the plaintiff when, in his opinion, the testimony offered by him does not support the action. 12 *Johns.* 299.

SEC. 4. Nonsuit is not proper where there is any evidence tending to prove the indebtedness. 13 *Cal.* 40.

SEC. 5. Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter-claim; nor under the one hundred and forty-eighth section of the practice act is he bound to tender costs before the nonsuit. The provision as to costs is simply that, by the nonsuit, plaintiff becomes subject to costs. 13 *Cal.* 637.

SEC. 6. The plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted and the jury has retired; but such right does exist at any time before such final submission and retirement. 18 *Cal.* 76.

SEC. 7. A plaintiff in a justice's court may withdraw and be nonsuited before the jury give in their verdict. 5 *Johns.* 346.

SEC. 8. When the plaintiff closes his evidence, if the court is of opinion that it would not sustain a verdict in

favor of plaintiff upon the testimony, a nonsuit should be granted. 23 *Cal.* 593.

Motion for, Should State Grounds.

SEC. 9. Where a motion is made for a nonsuit, without stating the grounds upon which it is made, it is not error to overrule the motion. 10 *Cal.* 267.

CHAPTER LXX.

NUISANCES.

	SECS.		SECS.
WHAT IS A NUISANCE.....	1-8	JURISDICTION OF ACTIONS CONCERNING NUISANCE.....	9

What is a Nuisance.

SECTION 1. *Nuisance Defined and Actions for.*—Anything which is injurious to health, or indecent or offensive to the senses or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered. *Pr. Act*, 249.

SEC. 2. *What is Nuisance.*—The fact whether a structure was a public nuisance is a question, not for the court, but for the jury to decide. *Gunter* vs. *Geary*, 1 Cal. 466. It is a public nuisance to erect a house in a highway. 1 *Cal.* 466. A house on fire or those in its immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate; and the private rights of the individual yield to considerations of general convenience and the interests of society. *Surocco* vs. *Geary*, 3 Cal. 73. The constitutional provision which requires payment for private property taken for public use does not apply to the destruction of a house to check a conflagration; nor can he who

abates this nuisance be made personally liable for trespass, unless the act is done without actual or apparent necessity. 3 *Cal.* 73. The erection of a steam engine and machinery and a grist mill, in the cellar under an auction store: *Held*, not to be such an injury as to require a restraining power of the court; at least, not until the question of nuisance should be determined by a jury, and even then the remedy at common law is adequate. *Middleton* vs. *Franklin*, 3 Cal. 241. All that part of a bay or river below low water or low tide is a public highway, common to all citizens, and if any person appropriates it to himself, exclusively, the presumption is that it is a detriment to the public. *Gunter* vs. *Geary*, 1 Cal. 462. Where plaintiff's mining claim was overflowed by means of a dam erected by the defendants, the court ordered a reduction of the dam so as to prevent the overflow; or if necessary its entire abatement. *Ramsey* vs. *Chandler*, 3 Cal. 241. A ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it. *Parke* vs. *Kilham*, 8 Cal. 77. A person may construct or continue what would otherwise be an actionable nuisance, provided that at the commencement of it no person was in a condition to be injured by it or, in other words, mere priority as between owners of the soil gave a superior right. *Tenny* vs. *Miners' Ditch Co.*, 7 Cal. 339. The diversion of a water-course is a private nuisance. *Tuolumne Water Co.* vs. *Chapman*, 8 Cal. 397.

SEC. 3. The statute defining what are nuisances and prescribing a remedy by action, does not take away any common-law remedy in the abatement of nuisances which the statute does not embrace. 5 *Cal.* 122.

SEC. 4. The rules of the common law were so far adopted in this state as to supply any defect which might exist in the statute laws by furnishing additional remedies for the correction of wrongs. 5 *Cal.* 122.

SEC. 5. It matters but little whether a nuisance complained of is called private or public at the common law; if either, it could be abated by the party aggrieved, if performed without a breach of the peace. 5 *Cal.* 122.

SEC. 6. Whatsoever unlawfully annoys or does damage to another is a nuisance, and such nuisance may be abated;

that is, taken away or removed by the party aggrieved thereby so as to commit no riot in the doing. 5 *Cal.* 122.

SEC. 7. If a person upon his own soil erect a thing that is a nuisance to another, as by the stopping of a rivulet, and thus diminish the water used by his cattle, the party injured may enter upon the soil of the other and abate the nuisance. 5 *Cal.* 122.

SEC. 8. The defendants purchased from miners upon "Lawson's Ravine" certain mining claims situated upon the ravine which had been held and worked for several years. A large surplus of water from the debouching of foreign ditches passed though the ravine, which was used by the miners upon the ravine in the washing of the gold-bearing earth and the removal of tailings from their claims. Subsequently to the location of mining claims upon the ravine, a portion of the plaintiffs erected a dam for the purpose of turning the water into a mill-race, and conducting the water to a mill occupied by them. The defendant complained of the erection and retention of the dam as injurious to the free use of his mining property above the dam, by flooding his ground with water and preventing an outlet to the tailings from his claims. Notice was given to the plaintiffs to remove or open their dam, which they refused to do, when the defendant in a peaceable manner proceeded to remove the dam himself and abate the same as a nuisance, and an action was brought against him for damages on account of the removal: *Held*, that the plaintiffs were not entitled to damages. 5 *Cal.* 123.

Jurisdiction.

SEC. 9. The county courts have original jurisdiction of actions to prevent or abate a nuisance. *People* vs. *Moore*, 29 *Cal.* 427.

CHAPTER LXXI.

OFFICERS.

SECTION 1. The term "officer," in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government. Officers are public or private, and it is said every man is a public officer who has any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office and the nature of that duty which makes him a public officer, and not the extent of his authority. 8 *Cal.* 41, 42.

SEC. 2. The acts of a *de facto* officer are good. 6 *Cal.* 215.

SEC. 3. The acts of an officer *de facto* are valid as between third persons. 17 *Cal.* 626.

SEC. 4. The acts of an officer *de facto*, whether judicial or ministerial, are valid so far as the rights of the public and third persons are concerned, and neither the title of such officer nor the validity of his act as such, can be indirectly called in question in a proceeding to which he is not a party. The legal presumption is always in favor of his authority. 3 *Cal.* 452, 453.

SEC. 5. The tenure of an office does not depend upon the will of the executive but of the incumbent. A civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. 6 *Cal.* 28.

SEC. 6. Strictly speaking, there can be no vacancy in the office of sheriff, by reason of the death, removal or resignation, of the incumbent, for upon the happening of such an event the coroner, by operation of law, becomes sheriff, and there is no interregnum or hiatus. 6 *Cal.* 93.

SEC. 7. The power of the board of pilot commissioners is *quasi* judicial, and they are not civilly answerable for their acts as such. They are public officers to whom the law has intrusted certain duties, the performance of which requires the exercise of judgment. They are unlike a min-

isterial officer whose duties are well defined and who must fail to execute them properly at his own peril. Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment. 6 *Cal.* 95.

CHAPTER LXXII.

SET-OFF OR COUNTER-CLAIM.

	SECS.		SECS.
WHAT IS	1	JUDGMENT MAY BE SET OFF	15–17
STATUTES CONCERNING	2– 6	IMPROVEMENTS AGAINST RENTS	18
EFFECT OF	7	OMISSION TO PLEAD	19–20
WHEN IT CAN AND CANNOT BE PLEADED	8–14		

What is.

SECTION 1. When parties dealing together have claims against each other, one may deduct the amount which is due to him from the claim which is made against him, and this is called a set-off. This practice is authorized by the following statutes:

Statutes Concerning.

SEC. 2. The answer of the defendant shall contain:

1st. If the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief; if the complaint be not verified, then a general denial to each of said allegations; but a general denial shall only put in issue material and express allegations of the complaint.

2d. A statement of matter in avoidance, a counter-claim constituting a defense, or the subject-matter of cross-complaint, which may entitle a defendant to relief against the plaintiff alone or against the plaintiff and a co-defendant. *Pr. Act*, 46.

SEC. 3. The counter-claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff,

and against a plaintiff or defendant between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1st. A cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff's claim, or defendant's defense, or connected with the subject of the action.

2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action. *Pr. Act*, 47.

SEC. 4. When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counter-claim could have been set up, neither shall be deprived of the benefit thereof by the assignment or death of the other, but the two demands shall be deemed compensated, so far as they equal each other. *Pr. Act*, 48.

SEC. 5. *Answer, Contents of, in Justice's Court.*—The answer may contain a denial of any of the material facts stated in the complaint which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or a counter-claim, upon which an action may be brought by the defendant against the plaintiff in a justice's court. *Pr. Act*, 574.

SEC. 6. *Manner of Pleading a Written Instrument.*—When the cause of action or counter-claim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or set off. The court may, at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence. *Pr. Act*, 576.

Effect of.

SEC. 7. Every man of good business sense would much prefer setting off his claim against that of another rather

than first pay the money out of his own pocket and then risk getting it again from the pocket of his adversary. Parties were often ruined by the practical operation of the old rule, which seems to have been founded more in the convenience of courts than upon the true principles of justice. Like the practice of a justice of the peace, who never heard any testimony except for the plaintiff, upon the alleged ground that the contrary practice of hearing the testimony on both sides tended to produce doubt and confusion in his own mind, the former rule may have been more simple, but still it was all on one side, and practically defeated the very ends contemplated by the law itself. Our practice act has placed parties upon an equal footing with respect to each other. It may possibly, in some instances, increase the difficulties in particular cases, but its general operation cannot fail to be more beneficial and just to the parties. Under the operation of the statutory rule, neither party is compelled to advance money, in the first instance, and then sue to recover it back again in the second. 8 *Cal.* 405.

Where it Can and Cannot be Pleaded.

SEC. 8. The law of set-offs is a matter of statutory regulation, and the correctness of the decision depends upon the construction to be given to the statute. The forty-seventh section of the practice act provides that the claim to be set off shall be a demand "existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action." In other words, that the claim shall be such that the party pleading it might obtain a several judgment against his adversary upon it; and this undoubtedly excludes a joint debt as a set-off against a separate debt. In this case the defendants seek to set off a debt of the plaintiff and his brother against a debt due to the plaintiff alone, and it is clear that the statute gives them no right to do so. 20 *Cal.* 281.

SEC. 9. An unliquidated claim for damages is not the subject of offset, either equitable or legal. 19 *Cal.* 331.

SEC. 10. When a creditor having a debt due him, se-

cured by mortgage, assigns the debt and mortgage, a judgment in favor of a third person against the creditor, purchased by the debtor after the assignment, but before notice of it to him, constitutes an offset *pro tanto* to the debt in an action upon it by the assignee. 20 *Cal.* 509.

SEC. 11. Accounts or demands, as in cases of set-off in other courts, must have existed at the commencement of the suit. So a breach of a promise to discontinue a suit cannot be set off in that suit. 8 *Johns.* 470.

SEC. 12. In an action in a justice's court upon a money demand, the defendant cannot set up in his answer, as a counter-claim or set-off, a demand amounting, exclusive of interest, to more than two [three] hundred dollars. A justice of the peace has no jurisdiction to pass upon a counter-claim or set-off, unless it be for such a sum as the defendant might have maintained an action on against the plaintiff in a justice's court. 23 *Cal.* 61.

SEC. 13. A party sued before a justice cannot file, as an offset, an account exceeding the justice's jurisdiction, although by giving credit for the plaintiff's demand, he reduces his own claim within the limit of his jurisdiction. 20 *Miss.* (5 Bennett) 497.

SEC. 14. If the defendant cannot substantiate the whole of the set-off offered by him, the justice ought not wholly to reject it; but if any part is proved, it ought to be allowed. 10 *Johns.* 110.

Judgment may be Set off.

SEC. 15. Where the parties to two judgments are not the same, a court of common-law jurisdiction cannot set off one against the other. 23 *Cal.* 596.

SEC. 16. The power of a court to set off one judgment against another, upon motion, is well established, and this power depends mainly upon the general jurisdiction of the court over its suitors and process. *Barbour on Set-off*, 32. And a purchaser and assignee of a judgment, even for a valuable consideration and without notice, takes subject to a right of set-off existing at the time of the assignment, for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor. *Graves*

vs. *Woodbury*, 4 Hill, 559; *Cooper* vs. *Bigelow*, 1 Cow. 206. And the fifth section of the practice act recognizes the same principle. 22 *Cal.* 432, 433.

SEC. 17. *Set-off of one Judgment against Another.*—A person may receive the money due on a judgment rendered in favor of himself and several others, co-plaintiffs, but he cannot without authority from his co-plaintiff set off a judgment due to him and them jointly against another judgment held by the defendant in such joint judgment against himself alone. 35 *Cal.* 195.

SEC. 18. *Set-off of Improvements against Rents.*—In ejectment, the fact that the defendant has made permanent and valuable improvements, in good faith and under color of title, is no defense to the action; but if such fact is set up in the answer in such language as to contain the essential facts to justify a set-off of the value of improvements against rents, it will be treated as a good answer for that purpose, although no offer is made of such set-off. *Anderson* vs. *Fisk*, 36 Cal. 625.

SEC. 19. A party does not lose his right to bring an action for a demand which he might have pleaded as a set-off in a former action, but neglected to do. 23 *Cal.* 597.

SEC. 20. An omission to assert a cross-claim when a demand is presented for payment, does not involve a waiver of the counter-claim, nor is a failure to discharge an unfaithful servant before his term of service has expired a release of damages arising from his neglect. 26 *Cal.* 294.

CHAPTER LXXIII.

PARTIES TO ACTIONS.

	SECS.		SECS.
By what Names Parties to be Styled	1	Husband and Wife	21–30
The State	2	Infants	31–34
Counties	3– 6	Persons in Interest	35–46
In whose Names Actions to be Prosecuted	7–17	Persons Severally Liable upon Same Instrument	47–49
Executors, Administrators and Trustees	18–20	Death or Disability of Party or Transfer of Interest	50–52

By what Names Parties to be Styled.

SECTION 1. In a civil action, the party complaining shall be known as the plaintiff and the adverse party as the defendant. *Gen. Laws*, 4941, 5464.

The State.

SEC. 2. Liability to be sued has no necessary connection with ability to sue. The state can sue in all cases, but she is only subject to be sued in the instances specially provided by law (18 *Cal.* 59); and in the absence of any statute permitting her to be sued, any judgment against her would be erroneous. 6 *Cal.* 258.

Counties.

SEC. 3. The people of a county are not a corporation, nor can they sue or be sued. 15 *Cal.* 33.

SEC. 4. Boards of supervisors cannot be sued in their official character, in ordinary common-law actions, for claims against the public, county or village, they represent, without express statutory provision. 18 *Cal.* 49.

SEC. 5. But counties are *quasi* corporations, and the power to sue and to be sued is given in general terms by an act prescribing the manner of commencing and maintaining suits by or against counties, passed May 11th, 1854. 6 *Cal.* 255.

SEC. 6. The statute gives to counties the right of prosecuting and defending all actions in the same manner and with the same effect as individuals. 8 *Cal.* 305.

In whose Names Actions to be Prosecuted.

SEC. 7. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the act to regulate proceedings in civil cases in the courts of justice of this state. *Gen. Laws*, 4943, 5464.

SEC. 8. Formerly, where a bond was given to an officer, state or corporation, suit had to be brought in the name of the party holding the legal title for the benefit of the persons interested, but our statute has introduced a new rule, and by the provisions of the practice act the suit must be prosecuted in the name of the real party in interest. Therefore, the plaintiff being the real party in interest has a right to sue upon a bond, though made payable to the people of the state. 7 *Cal.* 554.

SEC. 9. Whatever the rule may be under the old system under our system the right of action is in the party sustaining the injury; for, on a recovery, the other party, if entitled to receive the money at all and if judgment were had in the name of both, would hold it by right of and as a trustee for the other; and our practice act for convenience has given the right to sue to the party beneficially entitled to the fruits of the action. 10 *Cal.* 347.

SEC. 10. Where there are several obligees in an undertaking promising to pay "said parties enjoined," etc., suit may be brought in the name of one alone, if he be beneficially entitled to the fruits of the recovery (13 *Cal.* 591), or if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts. 15 *Cal.* 9.

SEC. 11. But a factor may sue in his own name where the goods have come into his actual possession, and where by reason of such possession he has a special property in them, and is entitled to maintain an action for injuries to them, and when sold for the price. 1 *Cal.* 83. The consignee named in a bill of lading is to be deemed *prima facie* the owner of the goods mentioned therein, and upon payment of freight may maintain an action against any person who assumes a control over them in violation of his right of property. 1 *Cal.* 417.

SEC. 12. An agent may sue in his own name at law on a note payable to him, although it describes him as agent of another. 1 *Cal.* 78; 5 *Cal.* 516.

SEC. 13. An assignment of an account by indorsement of the word "assigned" signed by the owner of the account, is sufficient to show the intention of the parties, and the assignee may bring an action in his own name. It is not error to permit the plaintiff, the assignee, to amend on the trial the assignment by inserting the words: "For value received, I hereby assign the within account," instead of the word "assigned"—the additional words being mere surplusage. The right of an assignment of an account existed before the passage of the practice act of 1854, and the right of the assignee to sue in his own name is given by the first section of the amended practice act of 1855. 6 *Cal.* 247, 248.

SEC. 14. To entitle the assignee of a judgment to bring suit in his own name upon the appeal bond filed in the cause he must have an assignment of the bond. The assignment of the judgment, while it may give him equitable rights to avail himself of the security afforded by the bond, cannot confer the right of bringing a common-law action upon it. 6 *Cal.* 88.

SEC. 15. An assignment by a creditor of a portion of a debt does not make the assignee a joint owner of the whole debt, and he is not a necessary party to a suit for its recovery. 21 *Cal.* 152.

SEC. 16. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due. *Gen. Laws*, 4944, 5464.

SEC. 17. If several persons associate themselves together and form a corporation, they cannot be sued as individuals for its debts. It is recognized in law only by its corporate name, and must sue and be sued by its corporate name. 26 *Cal.* 633.

Executors, Administrators and Trustees

SEC. 18. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another. *Gen. Laws*, 4945, 5464.

SEC. 19. In this state, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is therefore a necessary party to all suits affecting it. 8 *Cal.* 580.

SEC. 20. In cases of joint and several contracts or obligations, an administrator cannot be joined with the survivor, for one is charged *de bonis testaroris* and the other *de bonis propriis*. 5 *Cal.* 176; 6 *Cal.* 643.

Husband and Wife.

SEC. 21. When a married woman is a party, her husband shall be joined with her, except:

1st. When the action concerns her separate property or her right or claim to the homestead property, she may sue alone.

2d. When the action is between herself and her husband, she may sue or be sued alone. *Gen. Laws*, 5464; *Stat.* 1867–8, 550.

SEC. 22. We have but one form of action and but one set of rules to govern us in determining by and against whom the action is to be prosecuted; and in all cases where the statute is silent the common law has been adopted as the rule of decision. "The husband and wife," says Chitty, "must join if the action be brought for the personal suffering of or injury to the wife;" and this is the settled rule of the common law upon that subject. The right of recovery does not extend, however, to any matter for which the husband should sue alone. 18 *Cal.* 539.

SEC. 23. The husband and wife cannot recover jointly in an action *ex contractu* for a breach of a contract made

with the defendant to convey the wife, but it is well settled that for an injury done to the person of a married woman she must join in the action, and it is immaterial that the injury is charged to have been committed in violation of a contract. If the act producing the injury be in itself tortious, it may be so treated for all remedial purposes; and it would be absurd to hold, that because the wrong done amounts to the breach of a contract, it is therefore purged of its tortious character. 18 *Cal.* 533.

SEC. 24. The husband of a married woman is properly joined with her as a party defendant, in an action upon a partnership obligation contracted by the wife and third persons as partners, previous to the marriage and while she was a *femme-sole*. 22 *Cal.* 457.

SEC. 25. In an action brought by a married woman, concerning property belonging to her as a sole trader, under the act of 1852 the husband need not be joined. 7 *Cal.* 455.

SEC. 26. So in an action against a married woman, alleged to be a sole trader under that act, on a contract executed by her as such, it is improper to join her husband with her as defendant; and a complaint so drawn is demurrable. The effect of the statute is to make such married woman a *femme-sole* as to the particular business or profession in which she is engaged. 6 *Cal.* 498.

SEC. 27. The wife may sue alone when the action is between herself and her husband. It makes no difference whether there are other parties defendant to the action, as the statute does not use the word "only." The test of the wife's capacity to sue, is simply to ascertain if the suit is between her and her husband, and this being found in the affirmative, the necessity of introducing other parties cannot affect her right. The object of the statute is to take away the necessity of the old form of suing by *prochein ami*, and being a remedial statute it must be beneficially construed. 3 *Cal.* 321.

SEC. 28. A *femme-covert* cannot contract under the laws of this state so as to render her liable in a suit at law. 4 *Cal.* 285.

SEC. 29. If a husband and wife be sued together, the

wife may defend for her own right. *Gen. Laws*, 4947, 5464.

SEC. 30. This can be done as well when sued jointly with her husband as if the trial were separate; her defense, if a special one, could come in, in either case. 5 *Cal.* 388. To enable her to do so, she must possess, as defendant, all the rights of a *femme-sole*, and be able to make as binding admissions, in writing, in the action, as other parties. 9 *Cal.* 321.

Infants.

SEC. 31. When an infant is a party he shall appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof or a county judge. *Gen. Laws*, 4948, 5464.

SEC. 32. A general guardian of an infant has authority to institute an action on behalf of his ward. 20 *Cal.* 660.

SEC. 33. The guardian shall be appointed as follows:

1st. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or, if under that age, upon the application of a relative or friend of the infant.

2d. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or to a relative or friend of the infant. *Gen. Laws*, 4949, 5464.

SEC. 34. The provisions of sections nine and ten of the practice act, relative to the appointment of guardians *ad litem* where infants are parties, only apply where there is no general guardian, or where he does not act. Where the interests of the minor require it, the court in which an action is pending will appoint a guardian *ad litem*, even though the minor may have a general guardian. In a case where the infant defendant had a general guardian, the supreme court say: "As Lies was general guardian there was no occasion for his special appointment as guardian *ad litem* in the action. As general guardian he was authorized—indeed it was his duty—to appear for his ward. The statute declares that the guardian 'shall appear for

and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose as guardian or next friend.' *Gen. Laws*, 3377. The provisions of the civil practice act relating to the appointment of guardians *ad litem*, where infants are parties (Secs. 9, 10), only apply where there is no general guardian or where he does not act. Cases frequently arise where the interests of the minor are best served by the special appointment of a guardian *ad litem*, even though he may have a general guardian. In such cases the court would make a special appointment, and the act concerning guardians, to which we have referred, expressly reserves the power of the court in this respect. *Gen. Laws*, 3372. But where the court does not specially appoint for the particular action, the general guardian may appear, and it is his duty to appear for his ward." 19 *Cal.* 629, 632.

Persons in Interest.

SEC. 35. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this act. *Gen. Laws*, 4951, 5464.

SEC. 36. A father, or in case of his death or desertion of his family the mother, may maintain an action for the injury or death of a child; and a guardian for the injury or death of his ward. *Gen. Laws*, 4950, 5464.

SEC. 37. All the parties in interest should be joined in an action of trover. But there are only two ways of taking advantage of the non-joinder when the defect does not appear upon the face of the complaint, and that is either by answer or apportionment of the damages at the trial. 8 *Cal.* 516.

SEC. 38. Where the obligors in a sheriff's bond bind themselves jointly and severally in specific sums designated, they may all be joined in the same action, but separate judgments are required. 9 *Cal.* 286.

SEC. 39. One of four sureties having paid the common debt—two of the sureties being insolvent—may sue the remaining surety for his half of the debt, without joining the insolvents as parties. 19 *Cal.* 125.

SEC. 40. Where a plaintiff is tenant in common with

another, the defendant may raise the objection in a justice's court, on a motion for a nonsuit upon the trial, where the defect of the parties appears on the face of the complaint. 19 *Barb.* (N. Y.) 664.

SEC. 41. Any person may be made a defendant, who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. *Gen. Laws*, 4952, 5464.

SEC. 42. This section refers to cases in equity where all persons whose rights may be affected are to be brought in as parties in order that a complete decree may be rendered.* 9 *Cal.* 270.

SEC. 43. In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants in such action, who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for. It is only necessary, in such a case, for the plaintiff to sue the party who interferes with his rights. 11 *Cal.* 366.

SEC. 44. Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. *Gen. Laws*, 4953, 5464.

SEC. 45. This section was intended to apply to suits in equity and not to actions at law. 7 *Cal.* 333.

SEC. 46. Where a part owner brings an action in form, *ex delicto*, and the objection is not made by plea in abatement, the other part owner may afterwards sue alone. 8 *Cal.* 516, 517.

* Burnett, J., was not prepared to say whether it referred *alone* to cases in equity.

Persons severally Liable upon same Instrument.

SEC. 47. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff. *Gen. Laws*, 4954, 5464.

SEC. 48. This section is in derogation of the old rule, that one or all, and not an intermediate number, should be sued. 6 *Cal.* 183.

SEC. 49. It is no misjoinder of parties defendant for the plaintiff to sue one, or any number more than one, of all the persons severally liable upon the same obligation or instrument. 25 *Cal.* 521.

Death or Disability of Party or Transfer of Interest.

SEC. 50. An action shall not abate by the death or other disability of a party; or by the transfer of any interest therein if the cause of action survive or continue. In case of the death or other disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or, the court may allow the person to whom the transfer is made to be substituted in the action. *Gen. Laws*, 4955, 5464.

SEC. 51. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in. *Gen. Laws*, 4956, 5464.

SEC. 52. Parties in justices' courts may prosecute or defend in person or by attorney; and any person, on the request of a party, may act as his attorney, except that the constable by whom the summons or jury process was served shall not appear or act on the trial in behalf of either party. *Gen. Laws*, 5465.

CHAPTER LXXIV.

PARENT AND CHILD.

	SECS.		SECS.
INFANCY—ITS TERMINATION....	1–2	OF PARENTS.....	6–13
CAPACITIES AND INCAPACITIES OF	3–5		

Infancy—Its Termination.

SECTION 1. Males shall be deemed of full and legal age when they shall be twenty-one years old, and females shall be deemed of full and legal age when they shall be eighteen years old or at any age under eighteen when, with the consent of the parent, guardian or other person, under whose care or government they may be, they shall have been lawfully married. *Gen. Laws*, 4433.

SEC. 2. Males and females of legal age, as fixed by this act, shall be competent to make contracts, convey real estate and do all other acts and things, that persons of full age may legally do. *Gen. Laws*, 4434.

Capacities and Incapacities of.

SEC. 3. An infant may libel, slander, assault, convert and disseize. He can contract only for necessaries, but he can commit torts as efficiently as an adult, and against injuries of that character his non-age will afford him no protection. 25 *Cal.* 151.

SEC. 4. No one can take advantage of the fact of infancy, except the infant himself or his heirs or personal representatives. 24 *Cal.* 207.

SEC. 5. The main question in this case is, whether a mortgage executed in 1856 by a *femme-covert* under the age of eighteen, can be enforced against the plea of infancy, the mortgage having been made upon the separate estate of the *femme*. The act of May 10th, 1854 (*Wood's Digest*, 541), fixes the legal age of males at twenty-one and of females at eighteen, and provides that at those periods, respectively, they shall be competent to contract and to convey real estate. The act of April 2d, 1858 (*Statutes*, 108) provides that married women, when under the age of eigh-

teen and married with the consent of their parent or guardian, shall be deemed of full and lawful age. It is true that the statute of conveyances (*Wood's Digest*, Sec. 2, 100) empowers husband and wife, by their joint deed, to convey real estate to the wife; but the act continues: "In like manner as she might do if unmarried." Taking all these acts together, and it seems evident that the disability of infancy, as defined by the first act cited, attaches as well to *femmes-covert* under age as to *femmes-sole*, subject only to the act of 1858, which has, however, no application to mortgages executed in 1856. It is urged in avoidance of this plea, that the deed of an infant is not void but only voidable, and that it will be held valid unless disaffirmed on the infant's arrival at legal age. But if this doctrine be generally true it would not apply to such a case as this—the case, namely, of a married woman whose disability of coverture might prevent, if not the possibility of her own volition, of an act of disaffirmance, yet its effectual exercise; and the principle would not, moreover, apply to the case of a note and mortgage, in respect to which there would seem to be no act of disaffirmance necessary until demand of payment were made or enforcement were sought. It seems that refusal to acknowledge the asserted obligation was made as soon as payment was insisted upon. 18 *Cal.* 159, 160.

Of Parents.

SEC. 6. A parent may, for some purposes and under some circumstances, emancipate his child. The intention to emancipate is a question of fact, and in the absence of direct proof may be inferred from circumstances. 8 *Cal.* 123.

SEC. 7. A father may emancipate his minor child, and when emancipated the child is freed from parental control, and is in all respects his own man. Evidence that a minor was in the habit of doing business on his own account and in his own name, and of becoming responsible for his own supplies, is admissible for the purpose of proving his emancipation. The doctine of estoppel has no application to infants. 25 *Cal.* 147.

SEC. 8. The parent has a right to the services of his

child; and the resulting right to change the residence of the child is equally clear. 8 *Cal.* 123.

SEC. 9. Parents are under obligations to support their children, and are entitled to their earnings. 8 *Cal.* 123.

SEC. 10. It is the duty of the parent to supply his child with necessaries, and he is liable to others who furnish them under certain circumstances. The parent cannot divest himself of this duty by giving the child his own time. If the child is taken sick and the parent has means, he is bound to take care of him even after he has given him his time. The parent cannot absolve himself from that responsibility. And if that responsibility continues, the power over the child must also continue. The responsibility and the power must stand or fall together. The duty of the parent to feed, clothe and educate, the child must be commensurate with the power to control and govern. Such a responsible and delicate relation cannot be destroyed by the voluntary act of the father without consideration. A parent cannot cease to be the natural guardian of his infant child under such circumstances. And being the guardian of his child, no contract as between them can be enforced. It is the duty of the parent to support the child; and for doing this, it is very doubtful whether he could maintain a suit against the child, even upon an express promise made after becoming of age. And when a father promises his infant child a certain reward for doing that which he was already bound to perform, the agreement has no consideration whereon to rest. It is one of those understandings that must be left to the parties to settle themselves. It is of too doubtful and delicate a character to be the subject of investigation in a court of justice. 8 *Cal.* 124, 125.

SEC. 11. Even in cases where the child is of age and remains in the service of the parent as one of the family, courts have manifested great jealousy of claims for compensation. Where the alleged services were performed after the son was of full age, the court held that he was not entitled to recover, upon the ground that no mutual contract was proven. Courts listen reluctantly to claims for wages by a son against the estate of a deceased parent. Such claims must be accompanied with clear proof of an agree-

ment, not depending on idle and loose declarations, but on unequivocal acts of the intestate. As for example: A settlement of an account or money paid by the father to the son as wages, distinctly thereby manifesting that the relation which subsisted was not the ordinary one of parent and child, but master and servant. 8 *Cal.* 125, 126.

SEC. 12. Where the father is absent for some years, leaving his infant son to manage for himself, and contributing to his support, and not interfering in any way with his son's engagements, the son can sue and recover in his own name for work and labor done while a minor. Where an infant performs the labor with the consent of his father and for another person, and upon a promise to pay the infant, the latter can maintain an action in his own name. 8 *Cal.* 123.

SEC. 13. Parents may transfer this right to the earnings of their children, or authorize those who employ their children to pay them their own earnings, and the payment will be a discharge against the parents. The principle upon which the infant is allowed to collect his wages is that of *agency*. The infant can be his father's agent, and whether he is so or not is a question of fact, like any other question of agency which may be proven by either direct or circumstantial testimony. 8 *Cal.* 123.

CHAPTER LXXV.

PAYMENT.

	SECS.		SECS.
WHAT IS	1–7	UNDER PROTEST	14–16
BY MISTAKE OF LAW OR FACT	8–13		

What is.

SECTION 1. By agreement between creditor and debtor a less sum than the whole amount may be paid and received in full payment and discharge of any indebtedness, if such agreement be clearly manifested by a receipt or instrument, in writing, signed by such creditor. *Laws* 1867–8, 31.

SEC. 2. An agreement to pay a fixed sum in grain, at the market price, on a day specified, if not fulfilled by the delivery of the grain at the time fixed becomes a debt payable in money. Where such an agreement exists no demand of the grain is necessary, but a failure to deliver makes the sum fixed a money debt. 23 *Cal.* 65, 66.

SEC. 3. If the debtor at the time of, or previous to, payment, neglects to designate to which of several debts he applies his payment, his right to control the application is gone, and the creditor may exercise it at any time before suit. The institution of suit evidences the creditor's application of the payment. If the creditor has once made the appropriation, whether by verbal declaration or rendering an account, or by conduct inducing a reliance on a particular appropriation, or bringing suit in a way which declares the application, he cannot afterwards change it, but subject to this he may make the application at any time. 14 *Cal.* 446, 449.

SEC. 4. Where the defendant, being indebted to plaintiff, a banking firm, made a payment on account in the bank to one of plaintiff's clerks, and on a subsequent day agreed to lend to the clerk the amount thus paid, who took the money and used it, and the amount thus paid was never credited to the defendant on the books of the plaintiff: *Held*, that the amount paid by defendant in the usual way of business was a legal payment; the possession having been changed and the defendant having lost all control over it. If the defendant is ultimately liable for the amount thus advanced to the clerk, it must be in an action for thus advancing it, and not in an action on the original indebtedness. 6 *Cal.* 283, 284.

SEC. 5. When the plaintiff employs an agent to collect a note due from defendant, and the defendant employs the same agent to collect other notes due him and apply the same on plaintiff's note, and the agent fails after collecting money on defendant's account, the loss occasioned by the failure of the agent must fall on the defendant, unless the appropriation was actually made. The law does not make the application. The law does not apply money until it has passed from the debtor; so long as it remains in the hands

of the debtor or his agent it may be diverted for any other purpose, and there can be no legal appropriation thereof. 7 *Cal.* 83.

SEC. 6. Gold dust is not cash. A party may receive it at such price as he choose in lieu of cash—the same as he might accept any other article of merchandise instead of cash. 1 *Cal.* 49.

SEC. 7. Gold dust is constantly fluctuating in its market value; it is an article of traffic, like merchandise, and a payment in it is a payment for just so much as the parties agree and for no more. 1 *Cal.* 49.

By Mistake of Law or Fact.

SEC. 8. In the absence of fraud or mistake, a party cannot escape the consequences of an arrangement voluntarily made by him because of a misunderstanding of its legal effect. 22 *Cal.* 344.

SEC. 9. If money be paid in mistake of law and not of fact, the court cannot relieve. 2 *Cal.* 587.

SEC. 10. Money paid under a mistake or ignorance of law of our own country, but with a knowledge of the facts or the means of such knowledge, cannot be recovered back. 16 *Cal.* 565.

SEC. 11. Plaintiff is not entitled to relief on the ground of mistake which was of law and not of fact. 16 *Cal.* 145.

SEC. 12. Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. 20 *Cal.* 642.

SEC. 13. The principle that a liability cannot be discharged by a less sum than what is due, applies to payments in money, and has never been extended to a case where a certain quantity of goods which were of less value than the debt were delivered and accepted in satisfaction. 2 *Cal.* 497.

Under Protest.

SEC. 14. The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when

undue advantage is taken of the party's situation. It has no application to voluntary payments. 9 *Cal.* 417.

SEC. 15. Where money is paid upon compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiff's use. 9 *Cal.* 418.

SEC. 16. The compulsion or coercion which is sufficient in law to render a payment involuntary, must come from the party to whom or by whose direction the payment is made, and arise from the exercise or threatened exercise of some power possessed or supposed to be possessed by him over the person or property of the party making the payment. 18 *Cal.* 404, 405.

CHAPTER LXXVI.

PERSONAL LIABILITY OF OFFICERS.

OF JUSTICES..... 1-3 | OF CONSTABLES..... 4-8

Of Justices.

SECTION 1. If a justice of the peace in the discharge of any of his ministerial or judicial duties act corruptly, to the injury of the party, his conduct is a breach of the condition of his official bond (3 *Blackf.* 72), as if he corruptly discharge an offender by taking insufficient securities for his reappearance (15 *Wend.* 277), or corruptly refuse to take security required to be given on the prosecution of an appeal. His liability to an action in the latter case is because his duty in such proceeding is ministerial and not judicial. 8 *Wend.* 462.

SEC. 2. A magistrate is not liable for what he does in a judicial capacity, unless he acts corruptly or oppressively. 2 *Bay*, 1, 385; 38 *Maine* (3 Heath), 530; 2 *N. & M.* 148; 3 *Cush.* 543. If a public officer, in performing an act judicial in its nature, commit an error in fact or law in the exercise of his authority, he is not answerable in damages, and his act will be valid until reversed or set aside. 21 *Barb.* (N. Y.) 207. The rule of common law, except so far as it

has been changed by statute, exempts a judge from a civil suit or indictment for any act done by him when sitting as a judge. 8 *B. Mon.* 214.

SEC. 3. There is, however, a marked difference in the liability of a justice of the peace when he acts ministerially. The following are some of the acts which are purely ministerial, viz: the taking of security required to be given on the prosecution of an appeal (8 *Wend.* 462); the refusing an appeal and issuing an execution where the doing so is in violation of good faith and an abuse of discretion (38 *Maine*, 3 Heath, 530); the entering a recognizance so as to make it ineffectual (4 *Hane*, 331); in making a return upon an appeal so that a party is injured by reason of an error in such return (1 *Denio*, 589); in making a false return to an appeal (1 *Denio*, 589); in making a false return to a *certiorari* (14 *Johns.* 195); in entering satisfaction of a judgment on his docket, no matter for what consideration, unless the creditor is a party to it. 2 *Blackf.* 135. If a justice of the peace thus carelessly and improperly act, he will be liable; and in every instance, whether it be in his judicial or ministerial character, if it can be shown that his conduct is the result of malice, undue partiality or any other corrupt influence, he will be liable for such injury as may result therefrom.

Of Constables.

SEC. 4. After execution returned by a constable, judgment was recovered against him for neglect, the justice not having entered the return in his docket and the constable being unable to prove it *aliunde: Held*, that the neglect of the justice did not render him liable to the constable. 6 *Hill*, 487.

SEC. 5. If an attachment issue without the proof required by statute and be executed, the justice and the plaintiff and the constable are trespassers. 3 *Cow.* 206.

SEC. 6. An execution issued by a court of competent jurisdiction is a legal justification to an officer for taking and selling the judgment-debtor's property thereon, and he is not bound to investigate the genuineness or sufficiency of a receipt shown to him by the debtor in settlement of the judgment. 10 *Cush.* (Mass.) 46.

SEC. 7. Where a justice notifies a constable that an appeal has been entered and execution in his hands superseded, any subsequent sale under the execution is void and the constable is a trespasser. The regularity of the appeal is the justice's business and not the constable's. 27 *Penn. State*, 199.

SEC. 8. A ministerial officer may not be sued as a trespasser for simply obeying the command of a writ, regular on the face of it, and therefore trespass cannot be maintained against an officer who sells a horse by virtue of an execution, though the proceedings in the suit were irregular. 23 *Penn. State* (11 Harris), 189.

CHAPTER LXXVII.

PLEADING.

	SECS.		SECS.
DEFINITION AND OBJECT	1- 2	ALLEGATIONS AND PROOFS MUST CORRESPOND	16
RULES	3	VERIFICATION OF PLEADINGS	17
CONSTRUCTION OF PLEADINGS	4	PLEADINGS IN JUSTICES' COURTS, GENERALLY	18-23
FORM OF ACTION AND PLEADING	5	CONSTRUCTION OF PLEADINGS	24-25
THE COMPLAINT—WHAT IT IS	6	RULES OF PLEADINGS	26
COMPLAINT BY ADMINISTRATORS ET AL	7	WHAT ARE THE PLEADINGS IN JUSTICES' COURTS	27
COMPLAINT AGAINST ADMINISTRATORS ET AL	8	COMPLAINT	28-46
COMPLAINT IN ACTIONS OF ACCOUNT, ETC	9	ANSWER	47-54
ANSWER	10	DEMURRER	55-60
PLEAS OF NEW MATTER—PAYMENT—STATUTE OF LIMITATIONS	11	WHEN PLEADINGS ARE TO BE IN WRITING AND VERIFIED	61-62
SEPARATE DEFENSE	12	VERIFICATION OF PLEADINGS	63-65
DEMURRERS	13	WHAT JUSTICES SHALL DO WITH THE PLEADINGS	66
STRIKING OUT PLEADINGS	14	AMENDMENTS OF PLEADINGS	67-71
AMENDMENT OF	15	EVIDENCE UNDER THE PLEADINGS	72-76

Definition and Object.

SECTION 1. The pleadings are the formal allegations by the parties, of their respective claims and defenses, for the judgment of the court. *Gen. Laws*, 4976.

SEC. 2. The object is to advise the apprise party of the distinct subject-matter of averment or defense intended to be relied on, and to put the other party upon notice of what he has to meet. 12 *Cal.* 534; 3 *Cal.* 230.

It is impracticable in a work like the present to give a satisfactory treatise on pleading, except so far as may be immediately useful in practice in justices' courts. The following references will, it is hoped, contribute to the convenience of the profession in their investigation of subjects to which they refer, in whatever court they may arise. As introductory to the subject the following rules laid down by Justice Field, concurred in by Justice Baldwin, will be appropriate:

Rules.

SEC. 3. Rule 1st. *Facts only must be Stated.*—This means the *physical facts*, cognizable by the senses, or capable of being shown to a jury without the aid of legal inferences; the *facts*, as contradistinguished from *the law*, from *argument*, from *hypothesis* and from the *evidence* of the facts. A legal inference or conclusion from the facts should not be stated; that is not the province of the pleadings, under our system, which is to develop the facts. To apply the law to the facts—that is, to draw thence legal inferences or conclusions—is the province of the court. Argument in a pleading is equally appropriate, for that is to be made orally before the court when the facts are developed. Hypothetical statements are improper, for the court is to deal not with hypothetical cases, but with the facts of the case in hand. The defendant's pretenses are equally improper, as they are not the facts of the plaintiff's case.

The *facts* must be carefully distinguished from the *evidence* of the facts. The latter pertains to the trial and has no place in the pleadings. But inasmuch as the evidence is but a series of facts, it has sometimes been thought difficult to distinguish between the greater facts which ought to be set forth in a pleading and those other lesser facts which go to prove the former. There ought, however, to be no embarrassment on the part of any lawyer who has ever framed or who understands special verdicts. These have been long

known; and the rule is as old as their existence, that they must contain the facts found, and not the evidence to prove them.

The next rule, however, will give us a satisfactory test by which to distinguish the facts from the evidence. 15 *Cal.* 414, 415; 16 *Cal.* 243; 13 *Cal.* 641, 642; 10 *Cal.* 28; 22 *Cal.* 229, 232, 566.

Rule 2d. *Those Facts, and those only, must be stated which constitute the Cause of Action, the Defense or the Reply.*—Therefore:

1st. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact that is not alleged.

For example, when a writing is by the statute of frauds made necessary to the validity of a contract, the writing must be averred—that being one of the facts necessary to constitute a cause of action.

The plaintiff, on his part, must allege all that he will have to prove to maintain his action; the defendant, on his part, all that he must prove to defeat the plaintiff, after the complaint is admitted or proved.

2d. He must allege nothing affirmatively which he is not required to prove.

This is sometimes put in the following form, that is to say, that those facts, and those only, should be stated which the party would be required to prove. But this is inaccurate, as negative allegations are frequently necessary, and they are not to be proved; as, for example, in an action on a promissory note, the plaintiff must allege not only the making of the note, but that it has not been paid. The rule, however, applies to all affirmative allegations, and thus applied is universal. No matter what averments were held to be necessary in the former scheme of pleading, nothing of an affirmative character is now necessary beyond what the party must prove. For instance, it is enough to allege that the defendant published a libel of the plaintiff, without adding that he did it falsely or maliciously—the falsehood being presumed, and the malice being inferred from the falsehood.

It must be recollected, then—

In the first place, that every fact essential to the claim or defense should be stated. If this part of the rule be violated the adverse party may demur.

In the second place, that nothing should be stated which is not essential to the claim or defense; or, in other words, that none but *issuable facts* should be stated. If this part of the rule be violated the adverse party may move to strike out the unessential parts.

What is and what is not essential an uninstructed person might not readily discover, but a lawyer ought not to be in doubt. An unessential or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and of course need not be proved or disproved.

The following question will determine in every case whether an allegation be material: Can it be made the subject of a material issue? In other words, if it be denied, will the failure to prove it decide the case in whole or in part? If it will not, then the fact alleged is not material; it is not one of those which constitute the cause of action, defense or reply.

To illustrate this: Let us suppose an ultimate fact, upon the establishment of which the claim or defense depends, and that the establishment of this fact depends upon the establishment of three or four prior facts, which being established prove this. It is the ultimate fact, and not the prior or probative facts, which should be set forth. As for example, in an action upon the covenants of a deed; the execution and delivery of the deed are ultimate facts upon which the claim depends. When these come to be proved it may appear perhaps that the deed was delivered first in escrow, till the performance of certain conditions by the grantee; that these were afterwards performed, and then the delivery became absolute. These, however, are circumstances which, though they appear in proof should not be pleaded. Or, take the case of an action for land where the question is one of boundary. The point in issue is whether the defendant is in possession of the plaintiff's land—that being affirmed by the plaintiff and denied by the defendant. It would be out of place for either party to insert in his plead-

ing a correspondence respecting the dividing fence or the acts of the parties toward a practical location, because however important these might be in evidence they might not determine the cause; since, if the correspondence or the practical location were disproved, the question of the true boundary according to the deeds would still remain.

If in an action for a libel the defendant justifies, he must allege the truth of the charge, not the defendant's admissions, tending to prove the truth—since the admissions might be disproved and yet the charge be true.

So in an action upon a mortgage, if the defense be payment, the *fact* of payment must be alleged, not the *evidence* of the plaintiff's admission that it had been paid; since there may have been no admission but nevertheless a payment.

It results, then, from what has been stated, under the present rule: 1st, that the pleader must insert in his pleadings whatever he is to prove; 2d, that he must insert no affirmative allegation which he is not to prove; 3d, that what he does insert must be decisive of some part of the cause, one way or the other. 15 *Cal.* 415, 416; 23 *Cal.* 465.

Rule 3d. *All Statements must be Concisely Made, and when once Made must not be Repeated.*—There was never a greater slander upon the code than to say that it permits long pleadings. On the contrary, it enjoins conciseness everywhere; and if in any pleading that was ever written under its rule there be an unnecessary word, it was put there in disregard of its provisions. Nor is it possible to frame or conceive of a system proceeding upon the idea of disclosing the facts of the case, which could require greater conciseness than is here required. If pleadings are not to set forth the real claim and defense they are useless and had better be dispensed with. A summons to appear before the court and jury on a particular day to try the rights of the parties on a particular subject, would be just as useful. But if a pleading is to be a statement of the claim or defense, can the wit of man contrive to make it briefer than a concise statement of the facts? If an immaterial statement be inserted or even an unnecessary word, the courts have the power to strike it out.

To avoid repetition as well as to obtain conciseness, logical order is necessary. There are persons who are incapable of making a logical statement of anything; and such persons will be bad pleaders under the code. But a man of education, as every lawyer is supposed to be, ought to have no difficulty in setting forth any occurrence in its logical, which is its natural, order. And if he does this and sets forth only the facts on which his case hinges and uses no more words than are necessary, we shall have brevity and substance, and hear no more of long pleadings, unnecessary recitals or immaterial affirments. 15 *Cal.* 417; 14 *Cal.* 84, 87.

Construction of Pleadings.

SEC. 4. All pleadings must be taken most strongly against the pleader. 3 *Cal.* 230, 322; 5 *Cal.* 51; 10 *Cal.* 322; 1 *Cal.* 359.

Form of Action and Pleading.

SEC. 5. There shall be in this state but one form of civil action for the enforcement and protection of private right and the redress or protection of private wrongs. *Gen. Laws*, 4940. Form of. 2 *Cal.* 468; 22 *Cal.* 516; 17 *Cal.* 497; 21 *Cal.* 134. Must be subscribed by the party or his attorney. 8 *Cal.* 572.

The Complaint—What it Is.

SEC. 6. The complaint is a statement in legal form by the plaintiff of his cause of action against the defendant. What the practice act requires to be stated generally. 11 *Cal.* 168; 21 *Cal.* 74. Should state facts. 8 *Cal.* 369; 22 *Cal.* 247; 21 *Cal.* 349. Charging fraud. 15 *Cal.* 349; 8 *Cal.* 619. Request or demand. 9 *Cal.* 285.

Effect of Verdict or Default upon Defects in.—The general rule as to the effect of a verdict upon defects in pleading. 9 *Cal.* 269; 10 *Cal.* 555; 14 *Cal.* 210.

Complaint by Administrators et al.

SEC. 7. Complaint by administrators. 24 *Cal.* 167. By corporations. 6 *Cal.* 261. By executors. 16 *Cal.* 574, 579. By ferrymen. 3 *Cal.* 237.

Complaint against Administrators et al.

SEC. 8. Complaint against administrators or executors. 6 *Cal.* 393; 10 *Cal.* 555. Against agents. 8 *Cal.* 625; 7 *Cal.* 422. Against attorneys. 3 *Cal.* 110. Against joint wrong-doers. 25 *Cal.* 556. Against married women. 22 *Cal.* 522; 17 *Cal.* 119.

Complaint in Actions of Account, etc.

SEC. 9. Complaint in actions of account. 12 *Cal.* 19, 414, 422; 17 *Cal.* 178; 26 *Cal.* 69; 3 *Cal.* 244. In actions of detinue. 3 *Cal.* 189. In actions of replevin. 16 *Cal.* 578; 10 *Cal.* 17; 30 *Cal.* 190; 23 *Cal.* 349: 12 *Cal.* 296; 1 *Cal.* 160; 32 *Cal.* 585. In actions of trespass. 3 *Cal.* 440; 14 *Cal.* 82. In actions for goods sold and delivered. 18 *Cal.* 570; 32 *Cal.* 172. In actions for money had and received. 22 *Cal.* 516; 8 *Cal.* 624; 6 *Cal.* 29; 15 *Cal.* 344; 22 *Cal.* 457. In actions for money loaned. 3 *Cal.* 331. In actions for services. 22 *Cal.* 232. In actions on bonds. 3 *Cal.* 272; 7 *Cal.* 568. In actions on judgments. 6 *Cal.* 654; 12 *Cal.* 181; 7 *Wend.* 435. In actions on notes and bills. 9 *Cal.* 499; 4 *Cal.* 277; 8 *Cal.* 324; 7 *Cal.* 166; 11 *Cal.* 317; 25 *Cal.* 291. In actions on promises to pay. 4 *Cal.* 296. In actions on undertakings to release attachments. 9 *Cal.* 501; 6 *Cal.* 651. In actions on written contracts. *Gen. Laws*, 5000; 6 *Cal.* 258; 26 *Cal.* 294; 17 *Cal.* 101; 21 *Cal.* 122.

Answer.

SEC. 10. An answer is a waiver of demurrer. 1 *Cal.* 206, 470, 481. What answer must contain. 18 *Cal.* 464; 31 *Cal.* 185; 34 *Cal.* 153; 33 *Cal.* 208. The answer of the defendant shall contain:

1st. If the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof, according to his information and belief; if the complaint be not verified, then a general denial to each of said allegations; but a general denial shall only put in issue the material and express allegations of the complaint.

2d. A statement of matter in avoidance, a counter-claim constituting a defense, or the subject-matter of cross-complaint which may entitle a defendant to relief against the plaintiff alone, or against the plaintiff and a co-defendant. *Pr. Act*, 46.

Sham answer. 10 *Cal.* 29. Two classes of defense. 10 *Cal.* 27. General denial, what it puts in issue. 10 *Cal.* 28, 304; 2 *Cal.* 513; 11 *Cal.* 70; 21 *Cal.* 50. Specific denial of several allegations, effect of. 4 *Cal.* 120; 22 *Cal.* 539. Failure to deny material averments, effect of. 12 *Cal.* 403. What must be denied. 4 *Cal.* 202; 21 *Cal.* 215; 22 *Cal.* 229. What is sufficient denial of allegation. 10 *Cal.* 230; 12 *Cal.* 227; 14 *Cal.* 113. Denial of value. 22 *Cal.* 651.

Pleas, of New Matter—Payment—Statute of Limitations.

SEC. 11. New matter must be specially pleaded. 10 *Cal.* 304, 30; 21 *Cal.* 50, 11; 9 *Cal.* 74, 59; 13 *Cal.* 430; 5 *Cal.* 161. What is new matter. 21 *Cal.* 11, 50; 10 *Cal.* 27. Is a plea of payment new matter in the sense of the statute? 21 *Cal.* 74, 75. The plea in abatement. 1 *Cal.* 176, 177; 10 *Cal.* 555, 560; 4 *Cal.* 313. The plea of acquisition of another's interest. 4 *Cal.* 229. Of alteration. 5 *Cal.* 175. Of former recovery. 10 *Cal.* 583. Of fraud. 5 *Cal.* 160. Of the statute of limitations. 23 *Cal.* 16; 18 *Cal.* 482; 29 *Cal.* 20; 35 *Cal.* 122; 6 *Cal.* 430. It is usually as follows: "That the cause of action set forth therein did not accrue within .... years before the commencement of this action."

Separate Defense.

SEC. 12. Defenses separate. 8 *Cal.* 590; 11 *Cal.* 38. To actions on arbitration bond. 12 *Cal.* 340.

Demurrers.

SEC. 13. Demurrer, effects of. 3 *Cal.* 326. Objections that must be taken by. 6 *Cal.* 68, 183, 473; 4 *Cal.* 313, 198; 7 *Cal.* 334; 10 *Cal.* 560. When it lies. 19 *Cal.* 85, 481, 482, 483; 22 *Cal.* 457; 18 *Cal.* 314; 12 *Cal.* 314; 10 *Cal.* 170, 555, 464; 26 *Cal.* 294. What objections may be taken by answer or demurrer. 4 *Cal.* 313; 7 *Cal.* 510; 21 *Cal.* 635;

22 *Cal.* 356. What objections are cured by verdict or default. 1 *Cal.* 395; 2 *Cal.* 462; 4 Cal. 244; 6 *Cal.* 231.

Striking out Pleadings.

SEC. 14. Striking out pleadings. 22 *Cal.* 566; 13 *Cal.* 623; 25 *Cal.* 31; 18 *Cal.* 171.

Amendment of.

SEC. 15. Amendments of pleadings. 4 *Cal.* 229; 2 *Cal.* 409; 16 *Cal.* 375; 23 *Cal.* 78.

Allegations and Proofs Must Correspond.

SEC. 16. Allegations and proofs must correspond. 5 *Cal.* 159; 3 *Cal.* 191, 476; 6 *Cal.* 181; 7 *Cal.* 136; 16 *Cal.* 72; 8 *Cal.* 31; 14 *Cal.* 413; 13 *Cal.* 641, 642.

Verification of Pleadings.

SEC. 17. Verification of pleadings. 17 *Cal.* 123; 19 *Cal.* 40, 28; 6 *Cal.* 68; 9 *Cal.* 422; 10 *Cal.* 464.

Pleadings in Justices' Courts, Generally.

SEC. 18. Pleading shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended. *Gen. Laws*, 5503. The courts are always gentle and indulgent to pleadings before these inferior tribunals (6 *Cal.* 19), and the proceedings so far as respects regularity and form, will be reviewed with liberality; technical nicety and legal precision are not required in the pleadings; but it will be sufficient if there appears to be a good ground of action within the justice's jurisdiction, and that the merits of the cause have been tried. 3 *Johns.* 436; 10 *Johns.* 104. The supreme court does not require the same technical formality and precision in the pleadings in proceedings before justices as in that court, but will determine on them when brought up by *certiorari*, according to the merits of the case (5 *Johns.* 22); and so of the rules of evidence (5 *Wend.* 275); yet sufficient regard must be had to form to prevent the substantial rights of the parties from being sacrificed. 3 *Chand.* (Wis.) 183.

SEC. 19. It is not the policy of the law to confine parties to any nice strictness in their pleadings (4 *Cal.* 122; 13 *Cal.* 599; 23 *Cal.* 378), and defects in the proceedings cannot be availed of after judgment. 1 *Hemp.* 44.

SEC. 20. Any allegation or denial which apprises the opposite party of what is intended, will be sufficient; and if such party be at a loss as to what is intended, he should require the pleader to be more explicit. 1 *Sandf. Sup. Ct.* 260. Where plaintiff avers he is administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. 13 *Cal.* 599.

SEC. 21. When the cause of action or counter-claim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the court, and to state that there is due to him thereupon, from the adverse party, a specified sum which he claims to recover or set off. The court may at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence. *Gen. Laws*, 5507.

SEC. 22. The statute requiring an instrument in writing, upon which a suit is founded, to be filed before suit is commenced, is directory merely, and the filing may be waived by the defendant. 5 *Wis.* 516.

SEC. 23. Plaintiff began suit in a justice's court by filing as his complaint the following note, to wit:

"$150." "FOREST HILL, Jan. 10th, 1857.

For value received, I promise to pay to James McDonald the sum of one hundred and fifty dollars sixty days after the date of this note, at three per cent per month, or until paid. JOHN REUNER."

"Indorsed." "FOREST HILL, April 17th, 1858.

For value received, I hereby transfer the within note to J. C. Bower.

JAMES MCDONALD."

"Also: Pay to Jno. Hamilton or order. J. C. BOWER."

The defendant, McDonald, who alone defended, demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and for misjoinder of parties. The supreme court say: "This is an action on a non-negotiable promissory note. The note was assigned by

McDonald, the payee, to one Bower, who assigned it to the plaintiff. The action is against the maker, and McDonald and Bower, assignors. McDonald was the only party served with process, and the defense is by him alone. We cannot perceive in the objections which are urged to the complaint any cause for reversal. The note with the indorsements thereon constituted a sufficient foundation for the commencement of the suit, and the pleadings in the case were oral. We cannot interfere without violating the principle upon which we have always acted in such cases." 18 *Cal.* 128–130.

Construction of Pleadings.

SEC. 24. Great latitude is allowed to pleadings before justices, and courts construe them liberally (3 *Barb. Sup. Ct.* 609; 16 *Cal.* 374), with a view to substantial justice between the parties without reference to technical nicety or legal precision. 4 *Barb. Sup. Ct.* 361.

SEC. 25. If the facts stated are sufficient to show the nature of the claim or defense relied upon, nothing further is required. 16 *Cal.* 374.

Rules of Pleading.

SEC. 26. Where it is unnecessary that the pleadings should be in writing it is difficult to lay down any rule for determining their sufficiency. 16 *Cal.* 374. With regard to complaints before justices, the rules of pleading are not strictly enforced. 25 *Mo.* (4 Jones) 57.

What are the Pleadings in Justices' Courts.

SEC. 27. The pleadings in justices' courts shall be: 1st. The complaint by the plaintiff, stating the cause of action. 2d. The answer by the defendant, stating the ground of the defense. *Gen. Laws*, 5501.

Complaint.

SEC. 28. A contract containing conditions precedent, to be performed by the plaintiff, may be filed as the cause of action, without an averment of performance of the conditions. 4 *Blackf.* 420.

SEC. 29. So a bond with condition, which appears upon its face to have been executed between the parties to the suit, may be filed as the cause of action, without an assignment of breaches. But, in a suit by husband and wife, a note payable to the wife is not sufficient, without an averment of her marriage with her co-plaintiff. 4 *Blackf.* 174.

SEC. 30. In a suit by the assignee against the assignor of a promissory note, the plaintiff need only file, as a cause of action, the note with the assignment. 4 *Blackf.* 313.

SEC. 31. Under the statute requiring the plaintiff to file with the justice, before the issuance of the summons, the instrument purporting to have been executed by the defendant, the filing of a note signed by the defendant, payable to a third person, and not legally assigned to the plaintiff so as to give him a right to sue in his own name, is not a compliance with the statute, and does not give the justice jurisdiction. 1 *Eng.* 371.

SEC. 32. Where a plaintiff filed, before the summons issued, a bill purporting to be a bank note, upon which the name of the defendant did not appear, it was *held*, that, as it did not import any liability upon the defendant, it could not constitute the foundation of a suit, and was not such a filing of the cause of action as is required by the statute in Arkansas. 1 *Eng.* 182.

SEC. 33. A suit was commenced before a justice, entitled "*G. G., J. J. agent*, vs. *J. P.*," and a note executed by the defendant to G. G. alone was filed as the cause of action. It was *held* that G. must be considered as the only plaintiff, and that the note was legal evidence. 4 *Blackf.* 187.

SEC. 34. The complaint shall state in a plain and direct manner the facts constituting the cause of action. 90 *Pr. Act*, 573.

SEC. 35. A complaint containing a substantial statement of the cause of action is sufficient. 1 *Mann.* (Mich.) 352.

SEC. 36. If it apprise the defendant of the nature of the claim and be such that a judgment in the suit may be used as a bar to another action for the same cause. 9 *Ind.* 502; 11 *Ind.* 203.

SEC. 37. Where the complaint, in addition to a good cause of action, contains averments and prays relief res-

pecting matters not within the jurisdiction of the court, the action should not for that reason be dismissed, but the court should direct an amendment or disregard the objectionable matter. 20 *Cal.* 282.

SEC. 38. Although parties are not held to strictness in pleading, yet the substance of an issue must be formed. Where the action is in form *ex delicto*, the plaintiff should allege in substance that he has sustained some damage by the act or omission of the defendant and should set out in an intelligible manner the nature of the act of which he complains. 3 *Wis.* 270.

SEC. 39. Where an offense is created by statute, and a penalty inflicted, it is necessary that the party seeking a recovery should, in general, refer to such statute; but this rule does not apply to pleadings in justices' courts, which are usually without regard to form. 6 *Cal.* 66.

SEC. 40. In setting out a cause of action, a substantial compliance with the statute is all that is requisite; therefore, the expression "open account," where the statute says "book account," is not error. 1 *Hemp.* 181.

SEC. 41. In trespass on the case before a justice, a complaint, alleging that the defendant broke down and destroyed the pen in which the plaintiff's sow was kept, by which she was wholly lost to the plaintiff, is bad, unless it also state that the pen was on the land of the plaintiff. 3 *Green*, 437.

A Complaint.

SEC. 42. For "money due on a contract, damages for the non-performance of a contract," etc., was held sufficient to allow the introduction in evidence of a contract for the sale of lands, the defendant having pleaded the general issue, and requiring no specifications. 5 *Hill*, 60.

SEC. 43. Plaintiff claims fifty dollars for work and materials, is a sufficient statement to sustain a judgment by default. 23 *Ala.* 775.

SEC. 44. In actions commenced by or against a firm, it is not essential that the statement of the cause of action should set out the names of the persons composing the firm, though it is necessary that such actions should be brought

by or against the persons composing an incorporated company in their individual names. 2 *Carter* (Ind.) 551.

SEC. 45. The complaint need not show that the justice has jurisdiction; but, if it show the contrary, the suit must be dismissed. 4 *Blackf.* 299.

SEC. 46. If the plaintiff annex to his complaint or file with the justice at the time of issuing the summons, a copy of the promissory note, bill of exchange, or other written obligation for the payment of money upon which the action is brought, the defendant shall be deemed to admit the genuineness of the signatures of the makers, indorsers or assignors, thereof, unless he specifically deny the same in his answer and verify by his oath. *Pr. Act*, 577, Sec. 94; *Gen. Laws*, 5508.

Answer.

SEC. 47. The answer may contain a denial of any of the material facts stated in the complaint which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or a counter-claim upon which an action may be brought against the plaintiff in a justice's court. *Gen. Laws*, 5505.

SEC. 48. The defendant is not bound to set off unliquidated damages. 20 *Ill.* 93.

SEC. 49. A statement in answer that the party has not sufficient knowledge or information in respect to a particular allegation in the previous pleading of the adverse party to form a belief, shall be deemed equivalent to a denial. *Gen. Laws*, 5506.

SEC. 50. An answer denying generally the allegations of a verified complaint, conforms substantially to the requirements of the statute, and puts the plaintiff in proof of every thing necessary to maintain the action. 17 *Cal.* 85.

SEC. 51. Where a declaration contains a count for a cause of action within a justice's jurisdiction and another for a matter of which he has no jurisdiction, a plea to the jurisdiction answering both counts is bad. 4 *Denio*, 453.

SEC. 52. A defendant does not waive a plea to the jurisdiction of a justice by pleading the general issue after the justice has overruled his first plea. 9 *Barb. Sup. Ct.* 60.

SEC. 53. The defendant should state his grounds of defense before the trial, and the justice should note them on the docket. 2 *Gilman*, 389.

SEC. 54. A justice has a right to permit a defendant, who has omitted to appear on the return day of the summons, to plead on a day to which the cause has been adjourned, upon a proper excuse for the default being shown; still, it is a matter of discretion. 4 *Denio*, 576.

Demurrer.

SEC. 55. Either party may object to a pleading of his adversary or to any part thereof, that it is not sufficiently explicit to enable him to understand it or that it contains no cause of action or defense, although it be taken as true. If the court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend the defective pleading shall be disregarded. *Pr. Act*, 578, Sec. 95; *Gen. Laws*, 5509.

SEC. 56. A motion to dismiss a complaint on the ground that it does not state facts enough to constitute a cause of action, as it depends upon general principles of law and pleading and not on rules of practice which pertain to justices' courts, is improper in such courts. 17 *Barb.* (N. Y.) 141.

SEC. 57. By proceeding to trial on the merits, without exception to the cause of action, any defect in that particular is waived. 2 *Greene* (Iowa), 350.

SEC. 58. So, an objection to the form of a complaint, which may be taken by demurrer, will be considered as waived if not taken at the time of joining issue. 4 *Barb. Sup. Ct.* 361.

SEC. 59. So, also, an objection that the plaintiff has declared both on a contract and a tort, must be made at the time of pleading. 3 *Johns.* 436.

SEC. 60. Where a party instead of demurring for informality goes to trial, it must be considered as cured by the verdict. 3 *Cal.* 122.

When Pleadings are to be in Writing and Verified.

SEC. 61. The pleadings shall be in writing and verified

by the oath of the party, his agent or attorney, when the action is:

1st. For the foreclosure of any mortgage or the enforcement of any lien on personal property.

2d. For a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements or other possessions.

3d. To recover possession of a "mining claim." In other cases the pleadings may be oral or in writing. *Gen. Laws*, 5502.

[Unlike the provisions of the civil practice act with reference to pleadings in actions in courts of record.]

SEC. 62. The act does not require the answer to a verified complaint in an action in a justice's court to controvert *specifically* the material allegations of such complaint. It is sufficient if the answer deny the material allegations either generally or specifically. *Pr. Act*, Sec. 574; 17 *Cal.* 85. Where the answer, in addition to certain special denials, the form of which is open to criticism, contains a general denial of all the allegations of the complaint, it is sufficient to create an issue and to require evidence from the plaintiff. 20 *Cal.* 48, 49.

Verification of Pleadings.

SEC. 63. In all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true. And where a pleading is verified it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney or any other person except the party, he shall set forth in the affidavit the reasons why it is not made by the party. When a corporation is a party the verification may be made by any officer thereof; or, when the state or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts, except that

in actions prosecuted by the attorney-general in behalf of the state the pleadings need not, in any case, be verified. *Gen. Laws*, 4995.

Form of Verification by Party to the Action.

SEC. 64. The following is a form of verification by party to the action:

State of .....,
county of ..... } ss.

...., being duly sworn, says: That he is the plaintiff [or, "defendant"] in the above entitled action; that he has read [or, "has heard read," as the case may be] the foregoing complaint [or, "answer"] and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

....

Subscribed and sworn to before me, this .... day of ...., A.D. 18...

....,
Justice of the peace.

Form of Verification by Other Person than Party to the Action.

SEC. 65. The following is a form of verification by other person than party to the action:

State of .....,
county of ..... } ss.

...., being duly sworn on behalf of the plaintiff [or, "defendant"] in the above entitled action, says: That he has read [or, "has heard read," as the case may be] the foregoing complaint [or, "answer"] and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

That the said plaintiff [or, "defendant"] is absent from the county of ...., where his attorney resides [or, state the cause of the party's inability to verify the pleading] and the facts are within the knowledge of said affiant who is the agent [or, "attorney"] of the said plaintiff [or, "defendant"], and therefore he makes this affidavit.

....

Subscribed and sworn to, before me this .... day of ...., A.D. 18...

....,
Justice of the peace.

What Justice Shall do With the Pleadings.

SEC. 66. When the pleadings are oral, the substance of them shall be entered by the justice in his docket; when in writing, they shall be filed in his office and a reference to them made in the docket. *Gen. Laws*, 5503.

Amendments of Pleadings.

SEC. 67. The pleadings may be amended at any time before the trial, to supply a deficiency or omission, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the court by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars; but such payment shall not be required unless an adjournment is made necessary by the amendment; nor shall an amendment be allowed after a witness is sworn on the trial, when an adjournment thereby will be made necessary. *Gen. Laws*, 5511. Amendments should be liberally allowed by inferior courts in advancement of justice, and to secure a fair and speedy trial on the merits. 14 *Cal.* 201.

SEC. 68. Where a justice overrules a defense, on the ground that it is not well pleaded, it is his duty to order the pleading to be amended, and having permitted the defendant to present his defense, he should allow him to perfect his pleading for that purpose. 13 *Barb.* 533.

SEC. 69. He has the right to allow the complaint to be amended in all respects, so that the case may be determined on its substantial merits; and this, whether the defect be in the statement of jurisdictional or any other facts. The greatest liberality and indulgence should be extended in all such applications. 11 *Cal.* 280.

SEC. 70. Great latitude is given to the courts by our statute, in amending and altering pleadings, etc.; and they are required to administer substantial justice between the parties. 2 *Cal.* 195.

SEC. 71. It is error for a justice to dismiss a complaint, on motion, upon the ground that it does not contain facts enough to constitute a cause of action, without also giving the right to amend. 17 *Barb.* (N. Y.) 141.

Evidence Under the Pleadings.

SEC. 72. A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby. *Pr. Act*, 579, Sec. 96.

SEC. 73. The want of jurisdiction may be pleaded or given in evidence under the general issue. 4 *Blackf.* 299.

SEC. 74. The rule that where a party seeks to recover on a special agreement, and fails in his proof, he may still recover for work under it, if, supposing there had been no special agreement, he could have recovered, applies to pleadings in justices' courts. 2 *E. D. Smith* (N. Y.) 374.

SEC. 75. The date at the head of an account does not preclude the plaintiff from proving the time when the various items accrued. It does not pre-suppose the entire indebtedness to have accrued prior to that time. Such a rigid construction of the accounts of illiterate men would tend to prevent justice. 15 *Mo.* 442.

SEC. 76. A reply not being admissible in the justice's court, the allegation of new matter in an answer in that court, must in all cases necessarily be deemed controverted by the plaintiff; and it is competent for him to countervail it by evidence either in direct denial or of new matter by way of avoidance. Therefore, where in an action before a justice, the defendant pleads infancy, the plaintiff may, without replying or amending at the trial, show a new promise by the defendant after he became of age. 22 *Barb.* (N. Y.) 150.

CHAPTER LXXVIII.

RELEASE.

SECTION 1. A covenant not to sue, operates as a release only in order to avoid circuity of action. If the covenant be broken, the strict right of the covenantee is to recover on the covenant, and as the recovery must be the same in both suits, the doctrine of release is resorted to; but this

doctrine being technical cannot be extended in its construction, and where the debt is joint and the covenant not to sue is made to a portion only of the debtors, it will not be held as a release to either, but the party who holds the covenant must be left to his action upon it. 4 *Cal.* 64.

SEC. 2. A release of one joint debtor is a release of the others, but it must be a technical release under seal. 6 *Cal.* 186. A receipt given to one joint debtor on a note for a part payment, coupled with the words "which is in full on his part on the within note and the said A B is hereby discharged from all obligation in the same," is not such a release as will discharge the others. 6 *Cal.* 183.

CHAPTER LXXIX.

THE SUMMONS.

JURISDICTION GIVEN BY SUMMONS	1	BLANKS TO BE FILLED BY JUSTICE ONLY	9–10
CONTENTS OF SUMMONS	2–6	AMENDMENT OF SUMMONS	11
TIME IN WHICH SUMMONS TO REQUIRE DEFENDANT TO APPEAR	7–8	FORM OF SUMMONS	12
		FORM OF SUMMONS IN JUSTICE'S COURT	12

Jurisdiction of Person given by Summons.

SECTION 1. The judgments of courts are not binding unless jurisdiction be first had of the person of the party to be affected by them. This jurisdiction is given in this state by a form of notice prescribed by statute. The statute in such cases must be substantially pursued. 11 *Cal.* 378. The mere recital in a transcript from a justice's docket that defendant was *duly served*, is not sufficient. Before the transcript can be admitted to establish the rights of one holding under the judgment of a justice, the facts in regard to the service of summons must appear. *McDonald* vs. *Prescott and Clark*, 2 Nev. 109.

Contents of Summons.

SEC. 2. The summons shall be addressed to the defendant by name, or if his name be unknown, by a fictitious

name, and shall summon him to appear before the justice at his office, naming its township or city, and at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described in general terms sufficient to apprise the defendant of the nature of the claim against him; and in action for money or damages, shall state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It shall be subscribed by the justice before whom it is returnable. *Gen. Laws*, 5471.

SEC. 3. A justice having no jurisdiction of the cause by virtue of the summons issued, may, by the defendant's appearance and plea, acquire jurisdiction of the person (1 *E. D. Smith*, N. Y. 615), for the only object of a summons is to bring a party into court, and if that object be attained by the appearance and pleading of a party, there can be no injury to him. 7 *Cal.* 587; 21 *Cal.* 55.

SEC. 4. The cause of action must be stated in the summons with sufficient certainty to apprise the defendant of the legal character of the action. And the proof must support the summons. A summons to answer to an action "on a note of hand," is not supported by a writing obligatory. 1 *Pike*, 108.

SEC. 5. The plaintiff cannot recover a sum exceeding the amount indorsed on the summons. 4 *Gilm.* 64.

SEC. 6. The signature of a justice to a summons is sufficient if it give his surname in full, and his christian name by initials. 4 *Zabr.* (N. J.) 33, 838. The summons does not require a seal. 7 *Iredell*, 400.

Time in which Summons to Require Defendant to Appear.

SEC. 7. The time in which the summons shall require the defendant to appear and answer the complaint shall be as follows:

1st. If the plaintiff and defendant reside within the township when [where] the action is brought, within ten days after the service thereof.

2d. If the plaintiff and defendant reside out of the township but within the county where the action is brought, within five days after the service thereof.

3d. If the plaintiff reside out of the township where the action is brought and the defendant resides in said township, within three days after the service thereof.

4th. If the defendant resides out of the county or township in which the action is brought and the plaintiff resides in said township, within fifteen days after the service thereof. *Stats.* 1867–8, 551, 552.

SEC. 8. With reference to a judgment of a court of general jurisdiction, the supreme court say: "The fact that the defendant, although served with process, was not given the time allowed by the statute to appear and answer, is a good reason for quashing the writ upon motion by *amicus curiae*, or for extension of time to appear and answer on motion of defendant, it would be a good objection on error, arrest of judgment or motion for new trial; but the defendant having been summoned to appear on a day certain, it cannot be said that the court had no jurisdiction of the person, so as to make its judgment a nullity." 7 *Cal.* 64.

Blanks to be Filled by Justice only.

SEC. 9. The summons, execution and every other paper, made or issued by a justice, except a subpena, shall be filed without a blank left to be filled by another, otherwise it shall be void. *Pr. Act*, 611; *Gen. Laws*, 5542.

SEC. 10. A justice's writ, signed by the authority of the justice but not in his presence, is not valid. 4 *Foster* (N. H.) 263.

Amendment of Summons.

SEC. 11. The process of a court is, to a certain extent, within its own control. The object of the summons is to put the party upon notice of the demand against him. It is error for the plaintiff to take judgment by default without the proper notice required by law to be conveyed in the writ. The court has power to amend the summons by inserting the notice of the cause of action, and that unless the defendant appear and answer within the time specified, judgment by default will be taken against him, as it operates no hardship or surprise upon the defendant. 2 *Cal.* 194.

Form of Summons.

SEC. 12. The following is a form of summons:

In the justice's court of .... township, in the county of ...., state of ....

....
plaintiff,
against
....
defendant.

Summons.

The people of the state of .... send greeting to ...., defendant:

You are hereby required to appear before me, at my office in .... township, in the county of ...., in an action brought against you by the above-named plaintiff, and answer the complaint in said action on file in my said office, within .... days (exclusive of the day of service) after the service on you of this summons.

The said action is brought to recover of you the sum of .... due for merchandise sold and delivered to you at sundry times between the .... day of ...., 18.., and the .... day of ...., 18.., as per said complaint.

And you are hereby notified, that if you fail to appear and answer said complaint as above required, said plaintiff will take judgment against you for the said amount of .... dollars, together with costs and damages.

To the sheriff or any constable of said .... county, greeting:

Make legal service and due return hereof.

Given under my hand, this .... day of .... A.D. 18..

....,
Justice of the peace of said township.

Form of Summons in Justices' Court.

In justices' court of the county of ...., state of ....

....
plaintiff,
against
....
defendant.

Action brought in justices' court of the county of ...., and complaint filed in the office of the clerk of said court.

The people of the state of .... to ...., greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the justices' court of the county of ...., and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons.

The said action is brought to recover of you the sum of....dollars, principal and interest, upon your promissory note made and delivered to the plaintiff for the sum of .... dollars, on the .... day of ...., 18.., as per said complaint.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment

against you for said amount and interest due, together with costs and damages.

This action has been assigned, and you are required to appear for trial before ...., one of the justices of said court.

To the sheriff or any constable of the county of ...., greeting:

Make legal service and due return hereof.

Given under my hand, this .... day of ...., A.D. 18..

...., [L.S.]

Justice of the peace of said county.

...., clerk.

...., attorney for plaintiff.

CHAPTER LXXX.

SERVICE OF SUMMONS.

	SECS.		SECS.
When Service of Summons not Necessary	1- 2	Form of Return of Service when Defendant is a Corporation, etc.	18
Acknowledgment of Service.	3	Form, etc., when Defendant is a Minor	19
By Whom Summons to be Served	4	Form, etc., when Defendant is Insane	20
Form of Affidavit for Deputation of Person to Serve Summons, etc.	5	Form, etc., in all other Cases	21
Form of Request to Depute Person to Serve Summons	6	Form, etc., when Defendant cannot be Found	22
Form of Deputation to be Indorsed on Summons, etc.	7	Mode of Service when Defendant is out of the State	23-25
Mode of Service in Actions against Corporations	8-10	Form of Affidavit for Publication of Summons	26
Mode of Service in Actions against Minors	11-12	Form of Order for Publication of Summons	27
Mode of Service in Actions against Insane Persons	13	Form of Affidavit of Publication of Summons	28
Mode of Service in actions in all other Cases	14	Form of Affidavit of Deposit of Summons in the Post-office	29
Return of Service of Summons	15-17		

When Service of Summons not Necessary.

Section 1. An appearance entered by attorney, whether authorized or not, is a good and sufficient appearance to bind the party, except in those cases where fraud has been used or it is shown that the attorney is unable to respond

in damages. 4 *Cal.* 280. Mistake of counsel is never ground of error. The appearance of a licensed attorney and counsellor is *prima facie* evidence that he has been retained in the cause; and it would be a dangerous practice to afford litigants an opportunity of availing themselves of or escaping from the judgments of courts upon such a plea. An appearance by attorney at common law and by the express letter of our statute amounts to an acknowledgment or waiver of evidence. 4 *Cal.* 281.

SEC. 2. But the appearance of a party in court after the judgment was rendered, and his motion to set it aside, do not cure the fatal defect of a want of jurisdiction. If the court should set aside the judgment and permit him to answer to the merits, a judgment subsequently rendered would be valid; but the appearance of a party for the purpose of objecting to the prior void proceeding will not cure it. 8 *Cal.* 569.

Acknowledgment of Service.

SEC. 3. Courts will take judicial notice of the signatures of their officers, as such; but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the court cannot notice them. 9 *Cal.* 321. An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment to the sheriff will not suffice. 11 *Cal.* 314.

By Whom Summons to be Served.

SEC. 4. The summons shall be served by the sheriff or a constable of the county. *Gen. Laws*, 5473. The justice may, however, at the request of a party or good cause being shown therefor under oath, but not otherwise, specially depute any discreet and responsible person of suitable age and not interested in the action, or related to such justice or party, to serve a summons or execution,

with or without an order, to arrest the defendant, or with or without a writ of attachment. The said justice shall be liable on his official bond for all official acts of the person so deputed; such deputation shall be in writing on the process, and shall state the reason thereof. *Stat.* 1865–6, 467.

Form of Affidavit for Deputation of Person to Serve Summons, etc.

SEC. 5. The following is a form of affidavit for deputation of person to serve summons, etc.:

In the justice's court of .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

State of ....., county of ....., } ss.

...., being duly sworn, says upon information and belief: That one .... is fully advised of the whereabouts of the defendant in the above-entitled action [and also, of the property liable to attachment or execution in said action, or state such other facts as show good cause for the deputation], and in consequence thereof is better prepared to make service of the summons [and, "order to arrest the said defendant," or, "attachment," or, "the execution," as the case may be] in said action than any constable of the county of ....; that said .... is a discreet and responsible person of suitable age, to wit: over twenty-one years of age; is not interested in the said action and is not related to ...., the justice of the peace of said township, or to any of the parties in said action.

....

Subscribed and sworn to before me, this .... day of ...., A.D. 18 .

....
Justice of the peace.

Form of Request to Depute Person to Serve Summons, etc., to be annexed to the Foregoing Affidavit.

SEC. 6. The following is a form of request to depute person to serve summons, etc., to be annexed to the foregoing affidavit:

In the justice's court of the .... township, in the county of ...., state of....

...., plaintiff,
against
...., defendant.

To ...., justice of the peace of said township:

You are hereby requested, upon the foregoing affidavit, to depute ....

...., named therein, to serve and return the summons [and, "order to arrest the defendant," or, "attachment," or, "the execution," as the case may be] in the above entitled action. ...., plaintiff,
[or, ..., attorney for plaintiff].

Form of Deputation to be Indorsed on Summons, etc.

SEC. 7. The following is a form of deputation, to be indorsed on summons, etc.:

At the request of the plaintiff and for the reason that .... is fully advised of the whereabouts of the defendant in the within-entitled action [or, "of the property liable to attachment," or, "execution, in said action"] and in consequence thereof is better prepared than any constable in the county of .... to make service of the within summons [and, "the order to arrest the said defendant," or, "attachment," or, "the execution," or, state such other reason as may be shown by the affidavit for the deputation], and good cause being shown therefor under oath, I hereby specially depute the said ...., a discreet and responsible person of suitable age and not interested in said action or related to me or to any of the parties in said action, to serve the within summons [and, "order to arrest the defendant," or, "attachment," or, "the execution"].

....
Justice of the peace.

Mode of Service in Actions against Corporations.

SEC. 8. If the action be against a corporation the summons shall be served by delivery of a copy to the president or other head of the corporation, or to the secretary, cashier or managing agent, thereof, or when no such officer resides in the county, to a director resident therein. *Gen. Laws*, 5473.

SEC. 9. The summons must be served on one of the officers or agents named in the practice act. Service on a party in possession of the property, who does not appear to be one of the officers named, will not entitle the plaintiff to a judgment by default. 6 *Cal.* 186.

SEC. 10. Where, in an action against an incorporated company, the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company," it was held that it was not sufficient evidence of service to give the court jurisdiction, it not appearing that Street was "president or head of the corporation, or secretary, cashier or managing agent, thereof." The summons might with as much propriety have been served upon any other stranger. 10 *Cal.* 343, 344.

Mode of Service of Summons against Minors.

SEC. 11. If the action be against a minor under the age of fourteen years the summons shall be served by delivery of a copy to such minor, and also to his father, mother or guardian, or if there be none within the county, then to any person having the care or control of such minor, or with whom he resides or in whose service he is. *Pr. Act*, 542.

SEC. 12. When the infant is over the age of fourteen the service is only to be made upon him, as he may choose his own guardian. Although there may seem to be no good reason for requiring personal service upon a minor under the age of fourteen, the provision requiring personal service upon such minor, and also upon his guardian, is not the result of a misprint or a clerical mistake, but the deliberate will of the legislature. 9 *Cal.* 638.

Mode of Service in Actions against Insane Persons.

SEC. 13. If the action be against a person judicially declared to be of unsound mind or incapable of conducting his own affairs, and for whom a guardian has been appointed, the summons shall be served by delivery of a copy to such guardian. *Gen. Laws*, 5473.

Mode of Service in all other Cases.

SEC. 14. We have already seen how the summons shall be served in actions against corporations *(ante)*; against minors under the age of fourteen years, *(ante)*; against persons judicially declared to be of unsound mind or incapable of conducting their own affairs, and for whom a guardian has been appointed *(ante)*; and in all other cases the summons shall be served by delivery of a copy to the defendant, personally. *Gen. Laws*, 5473.

Return of Service of Summons.

SEC. 15. Where a defendant was sued by the name of John Cox, service was returned upon James Cox, and the judgment was against J. Cox, it was held to be error un-

less there was something in the record to show that the person served was the person sued. 6 *Cal.* 415, 416.

SEC. 16. Where a person is sued by a fictitious name, and the return of the sheriff on the summons shows service on the defendant by his proper name, as "John Doe, *alias* Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. 14 *Cal.* 117.

SEC. 17. A certificate of service of a complaint signed by "J. C. Butler, under-sheriff," is insufficient to prove service. It is only by virtue of his official position that the return of the sheriff is conclusive, and of such the courts must take judicial notice. But the courts cannot know an under-sheriff, and the act and return of a deputy is a nullity unless done in the name and by the authority of the sheriff. The defendant is, therefore, not brought into court by service. 5 *Cal.* 449; 23 *Cal.* 401.

Form of Return of Service when Defendant is a Corporation.

SEC. 18. The following is a form of return of service when defendant is a corporation, to be indorsed on original summons:

I hereby certify that I have served the within summons by delivering a true copy thereof to ...., the president [or, if the head of the corporation is known by any other name, designate him by that name, or, "the secretary," or, "the cashier," or, "the managing agent"] of the corporation named within as defendant, personally, at .... township, in the county of ...., this .... day of ...., A.D. 18..,

Fees, $ .....

....

Constable .... township.

Form of Return of Service when Defendant is a Minor under the Age of Fourteen Years.

SEC. 19. The following is a form of return when defendant is a minor under the age of fourteen years, to be indorsed on original summons:

I hereby certify that I have served the within summons by delivering a true copy thereof to the within-named defendant, ..., a minor under the age of fourteen years, personally, and also to ...., his father [or, "his mother," or, "his guardian," or, if there be none within the county, then the person having the care or control of said ...., or the person with whom

said .... resides, or the person in whose service said .... is, as the case may be], personally, at .... township, in the county of ...., this .... day of .... A.D. 1868 [and in case the minor has no father, mother or guardian within the county, then add: Said minor having no father, mother or guardian within the county of ....].

Fees, $ . ....

....,
Constable .... township,

Form of Return of Service when Defendant is Insane or Incompetent.

SEC. 20. The following is a form of return of service when the defendant is insane or incompetent, to be indorsed on original summons:

I hereby certify that I have served the within summons by delivering a true copy thereof to ...., the guardian for the within-named defendant, ..., personally, at .... township, in the county of ...., this .... day of .... A.D. 1868.

Fees, $ .....

....
Constable .... township.

Form of Return of Service in all other Cases.

SEC. 21. The following is a form of return of service in all other cases, to be indorsed on summons:

I hereby certify that I have served the within summons by delivering a true copy thereof to the within-named defendant, ..., [or, to .... one of the within-named defendants, if there are several defendants and only one has been served, or to ...., sued by the name of ...., the within-named defendant, if the defendant is sued by a fictitious name], personally, at .... township, in the county of ...., this .... day of ...., A.D. 1868.

Fees, $.....

....
Constable .... township.

Form of Return when Defendant cannot be Found.

SEC. 22. The following is a form of return when defendant cannot be found, to be indorsed on original summons:

I hereby certify that I have made diligent search for the within-named defendant, ..., and he cannot be found in the county of ....

....
Constable .... township.

Mode of Service when Defendant is out of the State or Cannot be Found.

SEC. 23. When the person upon whom the service is to be made resides out of the state or has departed from the

state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the justice, and it shall, in like manner, appear that a cause of action exists against the defendant in respect to whom the service is to be made, the justice shall grant an order that the service be made by the publication of the summons; the order shall direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week: *provided*, that publication against a defendant residing out of the state or absent therefrom shall not be less than three months. The service of summons shall be deemed complete at the expiration of the time prescribed by the order of publication; the justice shall also direct a copy of the summons to be forthwith deposited in the post-office, directed to the person, to be served at his place of residence. *Gen. Laws*, 5474.

SEC. 24. Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction. 12 *Cal.* 100.

SEC. 25. The affidavit stated that the "defendant S. was at the time a resident of the first township in the county of Contra Costa; that he had occupied a house on a tract of land claimed to be his own, and which he had cultivated up to the commencement of the suit and for a long time previous; that on the twenty-second day of October, the day before the commencement of the suit, he left his residence, informing his servant that he would be back that evening or the next day; that the summons in the suit was put in the hands of a proper constable, who made diligent search and was wholly unable to serve it; that S. had not returned to his residence, and that he believed he concealed himself for the purpose of avoiding the service of the summons, and that the claim sued on is a just debt." This was held to be sufficient to authorize the service by publication, and when publication made to give the court jurisdiction. 23 *Cal.* 85; 9 *Cal.* 111; 20 *Cal.* 81.

Form of Affidavit for Publication of Summons.

SEC. 26. The following is a form of affidavit for publication of summons:

In the justice's court of the .... township, in the county of ...., state of ...

....,
plaintiff,
against
....,
defendant.

State of .....,
county of .....,} ss.

...., being duly sworn, says: That he is the plaintiff in the above-entitled action; that the complaint in said action was filed with the justice of the above-named township, on the .... day of ...., A.D. 18.., and summons thereupon issued; that said action is brought to recover the sum of .... hundred dollars due and unpaid from ...., the defendant in said action, to said plaintiff upon a promissory note made by said defendant, and dated at the county of ...., on the .... day of ...., A.D. 18 .., payable in .... days to the said plaintiff with interest at the rate of .... per cent. per month until paid [or state such other cause of action as may exist against the defendant in respect to whom the service is to be made].

That said defendant resides out of this state, and cannot, after due diligence, be found therein [or, "that that the said defendant has departed from this state and cannot, after due diligence, be found therein," or, "conceals himself to avoid the service of said summons," as the case may be], and said affiant, in support thereof, states the following facts and circumstances:

That said summons, issued as aforesaid, was delivered to the constable of said township, that being the township where the said defendant last resided within this state, with directions to said constable to serve the same upon said defendant; and said constable has returned said summons to said justice with his return thereon indorsed, to the effect that said defendant could not be found in his township.

That said affiant has made diligent inquiry to find said defendant, but cannot, after due diligence, find him within this state [here state in detail the acts constituting due diligence to find the defendant and his place of residence, and the facts from which it shall appear to the satisfaction of the justice that the defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or that he conceals himself to avoid service of summons]; *e. g.*

That affiant, for the purpose of finding said defendant and ascertaining his place of residence, has made due and diligent inquiry of and among the relations, former neighbors, friends, business agents and correspondents, of the said defendant [as the fact may be, stating the names of the parties inquired of], and is informed by ...., the agent [or, "brother," or, "neighbor"] of said defendant, residing in the township of ...., in the county of ...., that said defendant is not, and does not, reside in this state, but that he is, and resides, out of this state, and that his present place of residence is at the city of ...., in the state of ..... Or,

That the said defendant is a resident of this state, and until the .... day of ...., 18.., resided in the township of ...., in the county of ....; that on the day last aforesaid the said constable called at said said defendant's house with intent to serve said summons upon him, and that the wife of said defendant stated that he had not been home for .... days, and she did not know where he was; that on the next day said constable called again and found the house locked up, and on inquiry at the next house was informed by ...., who resides there, that said defendant's wife had gone with her children into the country, and had said she should not return; that affiant called at said defendant's place of business and found it closed, and one ...., who was formerly employed as clerk of said defendant, told affiant that said defendant had discharged him .... days before, saying that he had failed and must leave the state. Said affiant therefore says that said defendant has departed from this state, and cannot, with due diligence, be found therein [or, "conceals himself to avoid the service of said summons," or both]. Or,

That the last known place of residence of said defendant was within this state, to wit: at the township of ...., in the county of ...., but that he removed thence on or about the .... day of ...., and his residence at this time cannot, on due inquiry, be ascertained; that said affiant has diligently made such inquiry, and for the purpose of ascertaining his place of residence he has inquired of the former neighbors and acquaintances [naming them] of said defendant at said township, and of his father and brother, who reside at said township, and is informed by them that they are ignorant of said defendant's residence, but that he is not, as they believe, within this state. [If the defendant's residence is known it must be stated, or if it can be ascertained it must be stated.]

Said affiant therefore says that personal service of said summons cannot be made on said defendant, and prays for an order that service of the same may be made by publication thereof.

....

Subscribed and sworn to before me, this .... day of ...., A. D. 18..

....,
Justice of the peace.

Form of Order for Publication of Summons.

SEC. 27. The following is a form of order for publication of summons:

In the justice's court of the....township, in the county of ...., state of ....

....,
plaintiff,
against
....,
defendant.

Upon reading and filing the affidavit of ....., the plaintiff in the above-entitled action and it appearing to the satisfaction of me, one of the justices of the peace of the above-named township, that ...., the defendant in said action, resides out of the state and cannot, after due diligence, be found therein [or, "has departed from the state and cannot, after due diligence, be found within the state," or, "conceals himself to avoid the service of the

summons in said action," as the case may be], and it also appearing from the said affidavit that a cause of action exists in said action in favor of said plaintiff and against said defendant, and that a summons has been duly issued out of the above-named court in said action, and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained and by the said affidavit made to appear. On motion of said plaintiff [or, "....., attorney for said plaintiff"], it is ordered, that the service of the summons in said action be made upon said defendant by the publication thereof in the ...., a newspaper published at ...., in the county of ...., hereby designated as the newspaper most likely to give notice to said defendant, and that such publication be made at least once a week for three months [or such other length of time as may be deemed reasonable: *provided*, that publication against a defendant residing out of the state or absent therefrom be not less than three months].

And it further in like manner appearing to my satisfaction that the residence of said defendant is known to be at ...., in the county of ...., state of ...., it is ordered, that a copy of the said summons be forthwith deposited in the post-office, postage prepaid, directed to the said defendant at his said place of residence.

Dated ....., A.D. 18..

....
Justice of the peace.

Form of Affidavit of Publication of Summons.

SEC. 28. The following is a form of affidavit of publication of summons:

In the justice's court of the.... township, of the county of ...., state of ....

....
plaintiff,
against
....,
defendant.

State of .....,
county of ..... } ss.

...., of said county, of being .... duly sworn .... says: That he is a white male citizen of the United States, over twenty-one years of age, and is competent to be a witness on the trial of the above-entitled action; that he is the principal clerk and book-keeper in the office of the ...., a newspaper printed and published in the said county; that the summons of which the annexed is a printed copy [annex printed copy of summons to this affidavit] was published in said newspaper at least once a week for three months, commencing on the .... day of ...., A.D. 18.., and ending on the .... day of ...., A.D. 18..

....

Subscribed and sworn to before me, this .... day of ....., A.D. 18..

....,
Justice of the peace.

Form of Affidavit of Deposit of Summons in the Post-office.

SEC. 29. The following is a form of affidavit of deposit of summons in the post-office:

In the justice's court of the .... township, in the county of ...., state of ....

...., plaintiff,
against
...., defendant.

State of ....., county of ..... } ss.

...., of said county, being .... duly sworn, ... says: That he is a white male citizen of the United States, over twenty-one years of age, and is competent to be a witness on the trial of the above-entitled action; that on the .... day of, A.D. 18.., the complaint in the said action was filed, and afterwards an order was made by the court for the publication of the summons in said action, and also a further order that a copy of said summons should be deposited in the post-office and directed to the defendant in said action at his place of residence, to wit: at ..., in the county of ...., state of ....; that afterwards, to wit: on the .. . day of ...., A.D. 18.., and in pursuance of the said order of the court in the premises heretofore made, he deposited in the post-office at ...., a copy of the said summons directed to ...., the said defendant, at ...., in the county of ...., state of ...., the place of his residence as aforesaid, and paid the postage thereon in advance.

....

Subscribed and sworn to before me, this .... day of ....., A.D. 18..

....

Justice of the peace.

CHAPTER LXXXI.

SHERIFFS AND CONSTABLES.

	SECS.
STATUTES CREATING THE OFFICE AND DEFINING THE DUTIES OF SHERIFF AND CONSTABLES	1– 2
THE OFFICE OF	3– 8
DUTIES, GENERALLY	9–25
MUST BE DILIGENT	26–30
RESPONSIBLE FOR DEPUTY	31–36
SEIZURE OF PROPERTY, OR LEVY BY	37–73
INDEMNITY	74–87
KEEPING OF GOODS	88–89
CONFLICTING CLAIMS	90–92
WRITS OF RESTITUTION	93–99
SALE BY	100–111
RETURN	112–123
DAMAGES RECOVERABLE OF	124–128
	NOS.
FORMS IN CRIMINAL CASES	1– 15
FORMS IN CIVIL CASES	16– 37
FORMS BY CONSTABLE	38– 45

Statutes Creating the Office and Defining the Duties of Sheriffs and Constables.

SECTION 1. All county officers in every county of the

state, and officers of a subdivision of a county, other than judicial officers and county supervisors, shall be elected by the qualified electors of their respective counties or subdivisions of a county at the general election in the year one thousand eight hundred and sixty-three, and of every second year thereafter, and shall hold their offices for the term of two years from and after the first Monday of March subsequent to their election, and until their successors are elected and qualified, except constables, who shall hold their offices for the term of two years from and after the first day of January next after their election, and until their successors are elected and qualified: *provided*, that the present officers mentioned in the preceding part of this section shall continue in office until the first Monday in March, one thousand eight hundred and sixty-four, except constables, who shall continue in office until the first day of January, one thousand eight hundred snd sixty-four.

SEC. 2. An act concerning sheriffs, passed April 29th, 1851, provides as follows: 1st. There shall be a sheriff in each of the counties of this state, to be elected in the manner prescribed by law. 2d. Before entering upon the discharge of his duties, each sheriff shall take the oath of office and give a bond to the state in the form prescribed by the "act concerning the official bonds of officers," conditional for the faithful performance of the duties of his office. The penalty of the bond to be given shall be as follows: In the counties of San Francisco and Sacramento the sum of one hundred thousand dollars; in the counties of Santa Clara, El Dorado and Yuba, the sum of fifty thousand dollars; in all other counties except San Luis Obispo and Santa Barbara, the sum of twenty-five thousand dollars; and in San Luis Obispo and Santa Barbara counties, twelve thousand dollars. 3d. The sheriff shall be a conservator of the peace in his county. 4th. It shall be the duty of the sheriff within his county:

First—To arrest and take before the nearest magistrate for examination all persons who commit or attempt to commit a public offense in his presence, or who have committed a public offense.

Second—To prevent and suppress all arrays, breaches of

the peace, riots and insurrections which may come to his knowledge.

Third—To execute the process, writs, warrants and order of the courts of justice, or of judicial officers, when delivered to him for that purpose.

Fourth—To attend in person or by deputy, all courts except justices', probate and recorders' courts, at their respective terms, held within his county, and to obey their lawful orders and directions.

Fifth—To serve at the request of a party to any action or proceeding, notices and papers therein.

Sixth—In the execution of these duties, to command the aid of as many male inhabitants of his county as he may think proper and necessary.

5th. When any process, writ or order, shall be delivered to the sheriff to be executed, he shall endorse upon it the year, month, day and hour, of its reception, and shall give to the person delivering it, if required, on payment of his fee, a written memorandum signed by him specifying the names of the parties in the process, writ or order, the general nature thereof, and the time it was received. He shall also deliver to the party served a copy thereof, without charge to such party.

6th. A sheriff to whom any process, writ, order or paper, shall be delivered, shall execute it with diligence according to its command or as required by law, and shall return it without delay to the proper court or officer with his certificate indorsed thereon of the manner of its service or execution, or if not served or executed, the reasons of his failure. For a failure to do so he shall be liable in an action to the party aggrieved for the sum of two hundred dollars and for all damages sustained by him.

7th. When any process, writ, order or paper, is to be returned to a court, officer or person, out of the county, the sheriff may forward it by mail, and on proof that it was mailed in season, properly directed, he shall be discharged from liability for a failure to return it.

8th. If the sheriff to whom a writ of execution is delivered shall neglect or refuse, after being required by the creditor or his attorney, to levy upon or sell any property

of the party charged in the writ which is liable to be levied upon and sold, he shall be liable on his official bond to the creditor for the value of such property.

9th. If a sheriff shall neglect or refuse to pay over, on demand, to the person entitled, any money which may come into his hands by virtue of his office, after deducting his legal fees, the amount thereof, with twenty-five per cent. damages and interest, at the rate of ten per cent. per month from the time of demand, may be recovered by such person from him and the sureties on his official bond, on application, upon five days' notice to the court in which the action is brought or the judge thereof in vacation.

10th. The sheriff shall keep an office at the county seat of his county.

11th. The sheriff's office shall be kept open on all days except Sundays, between the hours of nine and twelve in the forenoon and between the hours of two and five in the afternoon.

12th. Service of a paper upon the sheriff may be made by delivering it to himself in person or by delivering it to the under sheriff or to one of his deputies or to a person belonging to and in the office during office hours, or if no such person be there, by leaving it in a conspicuous place in the office.

13th. Each of the present sheriffs, within thirty days after the passage of this act, and each sheriff hereafter elected, immediately after entering upon the duties of his office, shall appoint an under sheriff to hold the office during his pleasure, and shall make a similar appointment as often as a vacancy occurs in the office of under sheriff. He may also appoint as many deputies as he thinks proper, to hold their offices during his pleasure.

14th. The appointment of an under sheriff and of deputy sheriff and also the nomination of any such appointment, shall be in writing and filed in the office of the county clerk. The sheriff may require of each person appointed under sheriff and of each of his deputies, a bond, with sureties, for the faithful performance of his duties, but the sheriff shall be responsible for the official acts of the under sheriff and his deputies. Before entering upon their re-

spective duties, the under sheriff and each of the deputies shall take the oath of office, which shall be indorsed on their respective appointments.

15th. During the absence of the sheriff from his county, or when the sheriff, from sickness or any other cause, is unable to discharge the duties of his office, the under sheriff shall exercise the powers and perform the duties of that officer, and at other times shall perform such services relating to the duties of the sheriff as may be required of him by that officer. A deputy sheriff shall execute all orders, writs and processes, of a court or judicial officer, and may perform every act incidental thereto.

16th. The neglect or misconduct in office of the under sheriff or any deputy, shall be a breach of the official bond of the sheriff by whom they are appointed.

17th. The county jail shall be kept by the sheriff and used as a prison:

First—For the detention of persons committed as witnesses in a criminal action.

Second—For the detention of persons committed for trial for a public offense.

Third—For the confinement of persons committed upon civil process.

Fourth—For the confinement of persons sentenced to confinement therein, upon conviction for a public offense or for examination, charged with having committed a public offense.

18th. The sheriff may appoint a keeper of the county jail, for whose acts, as such, he shall be responsible.

19th. The court of sessions of the county shall cause a county jail to be erected at the county seat, in case such jail has not been already erected, or shall provide some suitable place for the safe keeping of prisoners, which place, until the erection of a jail, is considered in this act as the county jail. The county jail or the place provided as such, shall contain a sufficient number of rooms:

First—For the confinement of persons committed for trial in criminal actions, separate and distinct from prisoners under sentence.

Second—For the confinement of prisoners under sentence.

Third—For the confinement of persons committed on civil process or as witnesses in criminal actions, separate from those mentioned in the last two subdivisions.

20th. Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, shall on no pretense whatever be kept or put in the same room, nor shall male and female prisoners (except husband and wife) be kept or put in the same room.

21st. When there is no jail in the county, or when the jail becomes unfit or unsafe for the confinement of prisoners, the county judge may, by a written appointment, filed with the county clerk, designate the jail of a contiguous county for the confinement of the prisoners of his county or of any of them, and may at any time modify or annul the appointment.

22d. A copy of the appointment certified by the county clerk shall be served on the sheriff and keeper of the jail designated, who shall receive in his jail and safely keep all prisoners authorized to be confined therein pursuant to the last section, and who shall be responsible for the safe keeping of the persons so committed in the same manner and to the same extent as if he was sheriff of the county for whose use his jail is designated, and with respect to the persons so committed he shall be deemed the sheriff of the county from which they were removed.

23d. When a jail shall be erected in the county for whose use the designation was made, or its jail shall be rendered fit and safe for the confinement of prisoners, the county judge of that county shall, by a written revocation, filed with the county clerk thereof, declare that the necessity for the designation has ceased and that it is revoked.

24th. The county clerk shall immediately serve a copy of the revocation upon the sheriff of his county, who shall thereupon remove his prisoners to his own jail.

25th. When a county jail or a building contiguous to it is on fire, and there is reason to apprehend that the prisoners may be injured or endangered, the sheriff or jailor shall remove them to a safe and convenient place and there confine them so long as it may be necessary to avoid the danger.

26th. When a pestilence or contagious disease breaks out in or near to a jail and the physician thereof certifies that it is liable to endanger the health of the prisoners, the county judge may, by a written appointment, designate a safe and convenient place in the county, or the jail of a contiguous county, as the place of their confinement. The appointment shall be filed in the office of the county clerk, and shall authorize the sheriff to remove the prisoners to the place or jail designated, and there confine them until they can be safely returned to the jail from which they were taken.

27th. The court of sessions of each county shall, from time to time, appoint a physician to the jail of the county.

28th. A sheriff or jailor upon whom a paper in a judicial proceeding directed to a prisoner in his custody is served, shall forthwith deliver it to the prisoner with a note thereon of the time of its service. For a neglect to do so he shall be liable to the prisoner for all damages occasioned thereby, and for a willful omission in this respect shall be deemed guilty of a misdemeanor.

29th. The sheriff, when he shall deem it necessary, may, with the assent in writing of the county judge, or in a city of the mayor thereof, employ a temporary guard for the protection of the county jail or for the safe keeping of prisoners, the expenses of which shall be a county charge.

30th. The sheriff shall receive all persons committed to jail by any competent authority, and shall provide them with necessary food, clothing and bedding, for which he shall be allowed a reasonable compensation to be determined by the court of sessions or board of supervisors, and except as provided in the next section, paid out of the county treasury.

31st. Whenever a person is committed upon process in a civil action or proceeding, except when the people of this state are a party thereto, the sheriff shall not be bound to receive such person, unless security be given on the part of the party at whose instance the process is issued, by a deposit of money to meet the expenses for him of necessary food, clothing and bedding, or to detain such person any longer than these expenses are provided for. This section

shall not apply, however, to cases where a party is committed as a punishment for disobedience to the mandates, process, writs or orders, of the court.

32d. A prisoner committed to the county jail for trial or for examination or upon conviction for a public offense, shall be actually confined in the jail until he is legally discharged, and if he be permitted to go at large out of the jail except by virtue of a legal order or process, it shall be an escape, and the sheriff or jailor permitting it shall be deemed guilty of a misdemeanor, and may be fined in any sum not exceeding twenty thousand dollars.

33d. A sheriff who suffers the escape of a person arrested in a civil action, without the consent or connivance of the party in whose behalf the arrest or imprisonment was made, shall be liable as follows:

First—When the arrest is upon an order to hold to bail or upon a surrender in exoneration of bail before judgment, he shall be liable to the plaintiff as bail.

Second—When the arrest is on an execution or commitment to enforce the payment of money, he shall be liable for the amount expressed in the execution or commitment.

Third—When the arrest is on an execution or commitment, other than to enforce the payment of money, he shall be liable for the actual damages sustained.

Fourth—The sheriff, upon being sued for damages for an escape, may exhibit proofs in mitigation and exculpation.

34th. The sheriff shall be liable for a rescue of a person arrested in a civil action equally as for an escape, provided he may show circumstances in exculpation.

35th. An action shall not, however, be maintained against the sheriff for a rescue or for an escape of a person arrested upon an execution or commitment, if, after his rescue or escape or before the commencement of the action, the prisoner return to the jail or be retaken by the sheriff.

36th. When a new sheriff is elected and has qualified and given the necessary security required by law, the county clerk shall give a certificate of that fact under his seal of office, upon the service of which on the former sheriff his

powers shall cease, except as otherwise provided in this act.

37th. Within three days after the service of the certificate upon the former sheriff he shall deliver to his successor:

First—The jail of the county with its appurtenances and the property of the county therein.

Second—The prisoners then confined in the county jail.

Third—The process, orders and other papers, in his custody, authorizing or relating to the confinement of the prisoners.

Fourth—All process and orders for the arrest of a party and all papers relating to the summoning of a grand or trial jury which have not been fully executed.

Fifth—All executions, attachments and final process, except those which he has executed or has begun to execute, by the collection of money or a levy on property.

38th. He shall also at the same time deliver to the new sheriff a written transfer of the property, process, papers, and prisoners delivered, specifying the process or order by which each prisoner was committed and detained. The new sheriff shall thereupon acknowledge in writing upon a duplicate of the transfer, the receipt of the property, process, papers and prisoners, therein specified.

39th. Notwithstanding the election and qualification of a new sheriff, the former sheriff shall return all process and orders before and after judgment which he has fully executed, and shall complete the execution of all final process which he has begun to execute.

40th. If the former sheriff neglect or refuse to deliver to his successor the jail process, papers and prisoners, in his charge, the new sheriff may, notwithstanding, take possession of the jail and of the prisoners confined therein, and the county court or county judge may upon application order the delivery of the process and papers.

41st. The sheriff shall receive and keep in the county jail any prisoner who shall be committed thereto by process or order issued under the authority of the United States until he be discharged according to law, as if he had been committed under process issued under the authority of this

state: *provided*, provisions be made by the United States for the support of such prisoner.

42d. A sheriff or jailor to whose custody a prisoner is committed as provided in the last section, shall be answerable for his safe keeping in the courts of the United States, according to the laws thereof.

43d. When an officer finds or has reason to apprehend that resistance will be made to the execution of process delivered to him for service, he may command as many male inhabitants as he may think proper, and any military company or companies in the county armed and equipped, to assist him in overcoming the resistance, and if necessary in seizing, arresting, and confining, the resisters and their aiders and abettors to be punished according to law.

44th. Every able-bodied male person over the age of eighteen and under the age of sixty, commanded by an officer to assist him in the execution of process as provided in the preceding section, who without lawful cause refuses or neglects to obey the command, may be fined by the court upon proof thereof in a sum not exceeding two hundred dollars.

45th. No direction or authority by a party or his attorney to a sheriff, or to an under or deputy sheriff, in respect to the execution of process or return thereof or to any act or omission relating thereto, shall be available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it be contained in a writing signed by the party to be charged or affected thereby or his attorney.

46th. When the sheriff is committed to the custody of another sheriff or of a coroner, under an execution or commitment for not paying over money received by him by virtue of his office, and remains committed for sixty days, his office shall be declared vacant.

47th. When the sheriff or other officer is legally required to perform a service in behalf of the people of this state which is not chargeable to this county or a private person, his account thereof shall be audited by the comptroller of state, and shall be paid by the treasurer of state.

48th. A sheriff or other ministerial officer shall be justified in the execution of all process and orders regular on

their face, and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued.

49th. The officer executing a process, warrant or order of any kind, shall be bound then and at all times subsequent so long as he retains it upon request to show same, with all papers attached, to any person interested therein.

50th. The sheriff or deputy in attendance upon court shall act as the crier thereof to call the parties and witnesses and all other persons bound to appear at the court, and make proclamation of the opening and adjournment of the court and of any other matter under its direction.

51st. A sheriff, under or deputy sheriff, is prohibited during his continuance in office from acting or having a partner who acts as an attorney or counsellor.

52d. Every sheriff shall be liable to the party injured on his official bond for neglect or mal-performance of any duty imposed upon him by law.

53d. Every sheriff who is guilty of willful negligence in the discharge of his duties, or who, in the execution or under color of his office, is guilty of any oppression or extortion, shall, upon conviction thereof, be fined in a sum not exceeding five thousand dollars, and may be removed from office.

54th. When the sheriff is a party to an action or special proceeding, the process and orders therein which it would otherwise be the duty of the sheriff to execute, shall, except when otherwise provided by this act, be executed by the coroner of the county.

55th. In case of a vacancy in the office of sheriff, the powers and duty of sheriff shall devolve upon the coroner of the county, and be executed by him until a new sheriff be appointed, elected and qualified, and has given security to be approved as required by law.

56th. Whenever a coroner acts as a sheriff, he shall be invested with the powers, duties and responsibilities, of the sheriff, and shall be entitled to the same fees for similar services.

57th. Process and orders in an action or proceeding may be executed by a person residing in the county designated

by the court, the judge thereof or a county judge, and denominated an elisor, in the following cases:

First—When the sheriff and coroner are both parties.

Second—When either of these officers is a party and the process of orders are against the other for a disobedience of an order or process therein.

Third—When either of these officers is a party and there is a vacancy in the office of the other, or when it shall be made to appear by affidavit to the satisfaction of the court in which the suit or proceeding is pending, or the judge thereof, that either of said officers, by reason of any bias, prejudice or other cause, would not act promptly and impartially.

58th. When process is delivered to an elisor, he shall execute it in the same manner as the sheriff is required to execute similar process in other cases.

59th. If the sheriff on being arrested by a coroner, or if a sheriff or coroner on being arrested by an elisor, or if another person on being arrested in an action in which both the sheriff and coroner are plaintiffs upon an order of arrest in a civil action, neglect to give bail or make a deposit of money instead thereof, or if he be arrested on execution against his body or on a warrant of attachment, he shall be confined in a house other than the house of the sheriff or the county jail, in the same manner as the sheriff is required to confine a prisoner in the county jail; the house in which he is thus confined shall thereupon become for that purpose the county jail.

60th. An elisor appointed to execute process and orders in the cases mentioned in this act, shall be invested with the powers, duties and responsibilities, of the sheriff in the execution of the process or orders, and in every matter incidental thereto.

61st. The act entitled "an act to prescribe the duties of sheriff," passed April 17th, 1850, and the act entitled "an act concerning jails and jailors," passed March 27th, 1850, are hereby repealed; but nothing in this section shall be deemed to affect any action already commenced or any proceeding already taken under said acts or any responsibilities incurred thereunder.

62d. This act shall take effect on the first day of July next.

The Office of.

SEC. 3. When it appeared that the claimant of the office had acted as sheriff, that being the office in controversy, that fact, together with the certificate of election, would raise the presumption that he had executed his bond and taken the oath of office. *People* vs. *Chugan*, 5 Cal. 390.

SEC. 4. A sheriff is a ministerial or executive officer solely, but there is no constitutional prohibition against his exercising the duties of tax collector, where the law consolidating the two offices was passed prior to his election. *Merrill* vs. *Gorham*, 6 Cal. 43; *People* vs. *Squires*, 14 Cal. 15. Strictly speaking, there can be no vacancy in the office of sheriff caused by the death, removal or resignation, of the incumbent, for, upon the happening of such an event, the coroner by operation of law becomes sheriff. *People* vs. *Phenix*, 6 Cal. 93.

SEC. 5. The coroner only holds the office of sheriff *ex officio* until the appointment of a new sheriff by the board of supervisors. 6 *Cal.* 93.

SEC. 6. Though the appointment of a sheriff by a county judge be void, yet the acts of such sheriff as a *de facto* officer are good. *People* vs. *Roberts*, 6 Cal. 215.

SEC. 7. In action by one claiming to have been elected sheriff against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show *prima facie* that a vacancy existed in the office and that he was elected to fill it. *Doane* vs. *Scannell*, 7 Cal. 395.

SEC. 8. The defendant being elected sheriff of the county of San Francisco in September, 1855, on July 26th, 1856, and after the consolidation act went into effect, one of the defendant's sureties applied to the county judge to be released from further liability; on the 6th of August the judge declared the office vacant by reason of the failure of defendant to file new bonds: *Held*, that the county judge had no jurisdiction, the new law then in force vesting the power of approving the bonds of such officer in the county

judge, auditor and president, of the board of supervisors. *People* vs. *Scannell*, 7 Cal. 438.

Duties, Generally.

SEC. 9. The sheriff has a right to enter into the premises of the defendant to search for his goods if he can do so without breaking an outer door of the house (*Semayne's case*, 5 Co. 92), nor can a window be broken for that purpose. *Cooke's case*, W. Jones, 429. He may enter the house, if it be open, and being once lawfully entered, he may break open an inner door or chest without even a request to open them; though, in general, it is more prudent to make such request for the purpose of seizing the goods of the defendant. He may break an outer door of a barn (1 *Sid.* 186) or of a store not connected with the dwelling house and forming no part of the curtilage. *Hagerty* vs. *Wilbe*, 16 Johns. 287. The sheriff is also authorized to enter the house of a stranger for the purpose of executing his writ, provided the defendant's goods are there, but his entrance will be justifiable only on the event of the goods being there, for if he should be mistaken in this respect he will be a trespasser. *Com. Dig. Execution*, C. 5. But though authorized to enter a stranger's house he cannot, of course, break open an outer door.

SEC. 10. A sheriff whose term of office has expired has no right to collect the state and county tax as unfinished business from the assessment list which has come into his hands while in office. *Fremont* vs. *Boling*, 11 Cal. 389.

SEC. 11. The taxes of 1855, after March, 1856, are not of the unfinished business of the out-going sheriff, for the reason that after the settlement of the sheriff with the county auditor in March, the delinquent taxes of that year are transferred to the tax list of the succeeding year, and it is made the duty of the then sheriff to proceed to collect such delinquent tax as other taxes. 11 *Cal.* 389.

SEC. 12. There is no irreconcilable conflict between the amendatory act of 1853 and the revenue acts of 1853 and 1854. The provision that the sheriff going out of office shall continue to collect the taxes coming to his hands before his time expired, was intended to provide for the

period intervening between October and March, the time of settlement. 11 *Cal.* 390.

SEC. 13. The sheriff being *ex officio* tax collector of foreign miners' licenses, by an act of the legislature may be deprived of the office of tax collector before the expiration of term. 11 *Cal.* 390.

SEC. 14. The sheriff and his deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require of the sheriff impossibilities or to impose unconscionable exactions. 13 *Cal.* 335.

SEC. 15. A deputy sheriff who seizes property under an attachment, is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. 12 *Cal.* 413.

SEC. 16. The duties of sheriff, as such, are more or less connected with the administration of justice; they have no connection with the collection of the revenue. *People* vs. *Squires*, 14 Cal. 16.

SEC. 17. A sheriff who sells land under execution and gives a certificate of the sale to his purchaser, and subsequently his term of office expires, is the proper person to make the deed. Consequently, where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale made by one sheriff and a deed executed by his successor: *Held*, that the plaintiff could not recover. 9 *Cal.* 103.

SEC. 18. *May Execute Deed, when.*—A deputy sheriff may, after the expiration of the term of office of his principal, and in the absence of the latter from the state, execute a deed to the purchaser at a judicial sale made by the sheriff while in office. The authority of the deputy is not required by the act of 1858, allowing the deed in such cases to be executed by the succeeding sheriff. 22 *Cal.* 373.

SEC. 19. *Deputy Sheriff may Finish.*—A deputy sheriff having levied while his principal was in office, may complete the sale after his successor has qualified. *Jackson* vs. *Collins*, 3 Cow. 89; *Jackson* vs. *Tuttle*, 9 Cow. 233; 6 *Wend.* 213.

SEC. 20. *Must Finish Process.*—Where an execution has been acted upon by taking the property into possession or, perhaps, by advertising it for sale, the person who began must finish it. *Mason* vs. *Sudam*, 2 Johns. 172.

SEC. 21. *Fieri Facias must be Completed.*—Where the sheriff has commenced the execution of a *fieri facias* while in office, he may complete it after he has gone out of office; and so it is in relation to most final process. This rule of the common law has now been carried into the statute. 8 *Cal.* 406; 11 *Cal.* 380.

SEC. 22. A constable has no power to execute process out of his township. 15 *Cal.* 296.

SEC. 23. Under sections six hundred and one and six hundred and two of the practice act, a constable may serve an execution out of his township. 17 *Cal.* 294.

SEC. 24. A constable, like any other ministerial officer, has the right to appoint as many deputies as he pleases, and the deputy is not guilty of any trespass in levying by virtue of legal process in his hands. 4 *Cal.* 188.

SEC. 25. *Constable's Deed.*—A sheriff's or constable's deed, executed under an execution sale which does not recite the judgment on which the execution was issued, is void. 25 *Cal.* 230.

Diligence of.

SEC. 26. Where one writ of attachment was placed in the sheriff's hands on Sunday and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first—no special circumstances being shown. 13 *Cal.* 335.

SEC. 27. Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for fraud or because defendant is about to leave the state. 13 *Cal.* 335.

SEC. 28. In the service of process the sheriff is responsible only for unreasonably or not reasonably executing it. He is not bound to start on the instant of receiving a writ to execute it without regard to anything else. 13 *Cal.* 335.

SEC. 29. The mere omission of a deputy to inform the sheriff of having a process in hand, is not such negligence as to charge the sheriff in case a writ last in hand was executed first. 13 *Cal.* 335.

SEC. 30. It is the duty of an officer, after he has once entered upon the execution of an attachment, to complete its execution with diligence. 29 *Cal.* 312.

Responsible for Deputy.

SEC. 31. *Sheriff Amenable for his Deputy.*—The sheriff is amenable for the acts of his deputy only in the ordinary execution of his office. If he act under the special instructions of the plaintiff or his attorney in giving credit on a sale, the sheriff is not answerable for his conduct in the matter. *Gorham* vs. *Gale*, 7 Cow. 739.

SEC. 32. *Recovery on Bond.*—If a sheriff be attached for the default of his deputy, he may pay the money without defending and recover against the sureties on the deputy's bond. *Andrus* vs. *Bealls*, 9 Low, 693.

SEC. 33. *Does not Cover Suits Wrongfully Commenced.*—The deputy's bond was conditioned to indemnify the sheriff from all costs, damages, expenses and trouble, touching and concerning the return and execution of process and against the not executing or wrongfully executing of process: *Held*, that it did not cover suits wrongfully instituted, but that some act or omission of the deputy must be shown of such a character that the sheriff would legally be bound to answer for it in damage. *Franklin* vs. *Hunt*, 2 Hill, 671.

SEC. 34. *Breaches of Official Duty.*—The bail of a deputy sheriff are answerable only for breaches of his official duty. They are not responsible for any want of courtesy to his principal, nor for his trespasses *colore oficii;* but for his default in paying money made by him on an execution whereby the sheriff has been made liable, they are answerable. *Rowe* vs. *Richardson*, 5 Barb. 385.

SEC. 35. *Does not Discharge Sureties.*—A sheriff does not discharge the sureties of his deputy by neglecting or declining to remove him at their request. *Andrus* vs. *Bealls*, 9 Cow. 693; *Barnard* vs. *Darling*, 11 Wend. 28.

SEC. 36. *Can't Deny Official Character.*—In an action by the sheriff upon his deputy's bond to him, the defendants are estopped by it from denying his official character. *Hall* vs. *Luther*, 13 Wend. 491.

Seizure of Property or Levy by.

SEC. 37. When the goods are found the officer may seize them. The seizure is complete as soon as the goods are in the power of the officer (2 *S. & R.* Pa. 142; 3 *Rawle*, 401), and, although the sheriff may return that he levied on personal property, if it was not in his view nor taken into custody it is no levy as to subsequent judgment-creditors. *Lowry* vs. *Coulter*, 9 Penn. 349. Still, the indorsement on a *fieri facias* of levy on goods which the sheriff levied on by virtue of a former execution, will be considered a good levy under the second or last execution, because the goods so levied upon are considered as in his custody and of course within his power. 7 *Penn.* 206.

SEC. 38. To render the levy perfect the articles seized should be designated in the execution or in a schedule annexed (1 *Wash.* Ch. 29), and the sheriff should take possession within a reasonable time in such a manner as to apprise everybody of the fact of his having taken them in execution. 1 *Watts*, 116. But if the defendant dispense with an actual seizure for his own benefit, the levy as to him will be valid. 6 *Watts*, 468.

SEC. 39. The *fieri facias* may be executed at any time and on the return day, but not on Sunday, when it is forbidden by statute.

SEC. 40. In general, the sheriff may seize and sell all those articles which he can find belonging to the defendant and which are *choses in possession*, except such as are exempted by the common law or by statute. 3 *Bouv.* 576.

SEC. 41. *The Effect of Seizure.*—Although the seizure of personal property does not change or alter the title to it, and it remains in the defendant, as has already been observed, yet it has the effect of releasing the lands of the debtor with regard to third persons. If, therefore, a judgment-creditor who has the first lien on lands of his debtor, issue an execution and levy on the personal property of the

defendant sufficient to satisfy his execution, he cannot afterward abandon that levy and claim to be paid out of the proceeds of the land. *Taylor's Appeal*, 1 Penn. 393.

SEC. 42. Having once levied on sufficient to satisfy the execution, the constable cannot make a second levy, for the judgment is ordinarily considered discharged by the first (7 *Cow.* 13), if made on property sufficient to satisfy it; yet it is not so when the property is fraudulently withdrawn by the debtor from the possession of the officer (11 *Wend.* 125), or when it shall appear that the property levied on did not belong to the judgment-debtor and was given up. Even if the property should be sold and the execution returned satisfied, and a third person should afterwards recover the value of it from the officer or the party, on the ground it was his property, the judgment would not be discharged. 6 *Wend.* 562.

SEC. 43. When the defendant's goods are pawned, or demised or let for years, or they have been distrained or in any other way are subject to a lien in the hands of a third person, the sheriff can only seize and sell the right of the defendant in such goods subject to the rights of such third person. 3 *Bouv.* 577.

SEC. 44. In general, choses in action cannot be taken in execution (3 *Penn.* 39), but in some of the states power is given to the sheriff, under a peculiar process authorized by statute, to attach the rights of the defendant to such chose in action (which is the law in this state); as, where a debt is due by a third person to the defendant, the defendant's rights may be attached and a third person is made a garnishee. 8 *Bouv.* 577.

SEC. 45. After having seized the defendant's goods the sheriff should keep them in his possession till they are sold; for if they are left in the possession of the defendant it will, in general, be considered a badge of fraud. 4 *Dall.* 167, 213. And another judgment- and execution-creditor may seize them and the first levy will be invalid. 2 *S. & R.* 142.

SEC. 46. And if the first levy be made merely to keep off other creditors, this being against the policy of the law, it will not protect them from another execution. 5 *Rawle*, 286. And a direction to "stay proceedings" destroys the lien as

it respects other creditors, and enables them to gain a preference. 4 *Rawle*, 280.

SEC. 47. Indeed, any act which shows that the plaintiff has not a continuing mind to cause the writ to be executed will, as between himself and third persons, or other creditors of the defendant, discharge the property levied upon from his lien; the lien will also be lost by taking a replevin bond. 5 *Whart.* 150.

SEC. 48. The next step to be taken by the sheriff is to advertise the goods levied upon for sale at public auction, for this is the only lawful way of disposing of them; he cannot keep them himself and pay the plaintiff's debt nor deliver them to the plaintiff in satisfaction of his execution. The plaintiff may, however, buy them as any other person at their value. *Bac. Ab. Ex.* C. 4.

SEC. 49. Where the execution is against one member of a firm for his individual debt, the sheriff may levy upon, take possession of and remove, the goods of the firm. In such case he seizes all the property and not a moiety. 2 *Johns.* Ch. 584. But though the sheriff may seize the entire goods he can only sell the moiety or share of the defendant therein, yet he may deliver the whole goods sold to the purchaser, who takes them as joint tenant with the other partners and subject to account for the full value in favor of the partnership creditors. If the sheriff sells the whole goods he will be a trespasser. 10 *Wend.* 318. If there be a separate execution against each partner, the officer seizes the whole property and sells together, the one moiety under the one execution and the other moiety under the other. *Watson*, 182.

SEC. 50. Where the execution-debtor owns property jointly with another, a sheriff who has such execution has the right to levy on such property and take it into possession, for the purpose of subjecting it to sale. 10 *Cal.* 378.

SEC. 51. So if a chattel be owned in common, on an execution against one part owner, the sheriff can only sell the debtor's share. *Allen*, 156.

SEC. 52. But he may take possession of the whole property and deliver it to the purchaser. 2 *Barb.* 636.

SEC. 53. Where the sheriff seizes, on an execution

against one, goods owned by two, as tenants in common, and the latter afterwards purchases the interest of his co-tenant therein, the sheriff may advertise and sell the entire interest or property in the goods without making a new levy. 4 *Hill.* 158.

SEC. 54. If upon a levy upon partnership property under an execution against one partner, the other partners receipt for the property, it is no answer to an action against them on the covenant that the property was partnership property and had been, subsequently to the covenant, applied to the use of the partnership. 23 *Wend.* 606.

SEC. 55. Where there is a levy by one execution on the interest of one member of the firm, and another execution comes to the sheriff's hands against the firm, the latter execution must be paid first; but if a sale has been had on the former and not on the latter, the first execution takes the proceeds. 21 *Wend.* 676.

SEC. 56. *Levy upon Interest of Owner in common of Chattels.*—Where two parties were owners in common of certain hay, and a writ of attachment against one of them was placed in the sheriff's hands with instructions to levy on the hay: *Held*, that it was the sheriff's right and duty to take the entire property into his possession, though he could not sell more than the interest of the attachment debtor; and that the other owner in common could not maintain replevin against the sheriff before a sale for his share. *Lawrence* vs. *Burnham*, 4 Nev. 361.

Sheriffs.

SEC. 57. *Levy.*—If the master of a vessel be a part owner, his interest in the vessel may be levied on and sold; but his agency as master will in no wise be affected. *Loring* vs. *Illsley*, 1 Cal. 31.

SEC. 58. *Levy.*—A being indebted to B delivered to him merchandise as security for his debt, which he was to sell and apply the proceeds to its payment. A sheriff levied on the property as belonging to A: *Held*, that the merchandise was not subject to seizure under an execution against A without first paying the debt of B. *Swanton* vs. *Sublette*, 1 Cal. 124.

SEC. 59. *Levy—Attachment.*—A sheriff who levies an attachment by virtue of the process of the court, has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette* vs. *Melhado*, 1 Cal. 105.

SEC. 60. *Levy—Personal Property.*—By the statute of 1850, personal property levied on by the sheriff must be actually seized and sold in the presence of the purchaser. *Smith* vs. *Morse*, 2 Cal. 556.

SEC. 61. *Levy by Authority of Agent.*—The assent of an ordinary agent who had general charge of his principal's affairs during his temporary absence, will not justify the sheriff who holds an execution against a third person in levying upon property in the possession of the principal in his absence.

SEC. 62. *Cannot Levy on Money in his Hands.*—Money in the hands of a sheriff collected on execution is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment; nor can the sheriff attach money collected on execution in his own hands. *Clymer* vs. *Willis*, 3 Cal. 363.

SEC. 63. *May Levy on Real Estate.*—A sheriff on the request of defendant may levy on real estate, though there be personal property amply sufficient to satisfy the execution. *Smith* vs. *Randall*, 6 Cal. 50.

SEC. 64. *Levy on Property Claimed by a Third Party.*—In an action against a sheriff for refusing to levy an attachment on certain property as belonging to the attachment-debtor, testimony that the property had been claimed by a third party, and the right of property tried before a sheriff's jury and decided in favor of claimant, is irrelevant and inadmissible when those facts have not been set up as new matter of defense in the answer. *Strong* vs. *Patterson*, 5 Cal. 157.

SEC. 65. *May Justify Levy.*—An officer who seizes property in the hands of the debtor, may justify under the execution or process; but when he takes property from a third person, who claims to be the owner thereof, on execution, he must show the execution; if on attachment, the

writ of attachment, and, as we think, the proceedings on which it was based. *Thornburg* vs. *Hand*, 7 Cal. 561.

SEC. 66. *Vendors' Lien not Subject to Levy.*—The equitable lien held by the vendor of real estate, after absolute conveyance thereof, is not subject to levy or sale on execution, nor is it the subject of private transfer. *Ross* vs. *Heintzen*, 36 Cal. 313.

SEC. 67. A levy may be good as against the defendant in the writ and not good as to third persons. The conduct of the defendant may make the levy good by way of waiver or estoppel or agreement. 14 *Cal.* 48.

SEC. 68. As to third persons, there can be no levy when the officer does not know the subject of the levy; as, where he stands at the door of a store which is locked and keeps others out. The levy dates from the time he gets into the store and takes possession. 14 *Cal.* 48.

SEC. 69. Service of a copy of execution and notice of garnishment upon a third party, constitute no lien on property of the debtor in his hands capable of manual delivery. 6 *Cal.* 195.

SEC. 70. A levy under execution on sufficient property to satisfy it, is a satisfaction of the judgment. 8 *Cal.* 29.

SEC. 71. A deputy sheriff who seizes property under an attachment is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. 12 *Cal.* 412.

SEC. 72. *Time of Return.*—The time in which a sheriff makes return to an execution does not affect the validity of the execution or of a sale under it. 6 *Cal.* 277.

SEC. 73. *Levies after Petition in Insolvency.*—Attachment issues against H. and the sheriff proceeds with the writ to his store, which is locked and fastened front and rear by iron shutters. The sheriff with his deputy stand at the door guarding all entrance. H. now files his petition and schedule in insolvency, and the usual order of stay of all proceedings is made. H. returns to the store and advises the sheriff of these things. The sheriff threatens to break open the store, when H. gives him the key and he enters and levies: *Held*, that the sheriff has no right to levy, and

that the property vested in the assignee of the insolvent subsequently appointed by relation from the filing of the petition and schedule. *Tuffts* vs. *Manlove*, 14 Cal. 51.

Indemnity.

SEC. 74. The bond given to release property attached only releases it from the custody of the sheriff and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his judgment. 6 *Cal.* 277.

SEC. 75. In a bond given to release property seized on an attachment, the obligors undertook to pay, on demand, to plaintiffs in the action, the amount of the judgment and costs, not to exceed three thousand dollars, which plaintiff might recover. In the bond the action is recited as for one thousand six hundred dollars. Upon delivery of the bond the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the penalty of the bond: *Held*, that recovery may be had on the bond to the extent of the penalty. 13 *Cal.* 553.

SEC. 76. If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments and executions, that shall come or be brought against him, a sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. *Lott* vs. *Mitchell*, 32 Cal. 23.

SEC. 77. *Time a Bond takes Effect.*—A bond to indemnify a sheriff takes effect from the time of its delivery. *Buffendeau* vs. *Brooks*, 28 Cal. 641.

SEC. 78. *May Defend a Suit against Himself.*—The sheriff, though indemnified, is entitled to take upon himself the conduct of the defense of a suit against him for an official act, and a motion by the indemnitor to substitute an attorney for the one retained by the sheriff will be denied. *Peck* vs. *Acker*, 20 Wend. 605.

Bail in Civil Action.—The sheriff is not competent bail in a civil action. *Bailey* vs. *Warden*, 20 Johns. 129.

SEC. 79. *Sheriff may Deliver up the Property unless Indemnified.*—But the sheriff may deliver up the property to the claimant if the jury find for him, unless the plaintiff indemnify him. 10 *Cal.* 189.

SEC. 80. *Indemnity Bond, Remedy on.*—When an indemnity bond is given to a sheriff to hold him harmless and pay any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not or whether his official sureties could be held or not, and a bill in equity will not lie. *White* vs. *Pratt*, 13 Cal. 524.

SEC. 81. *Bond given Voluntarily.*—A bond given voluntarily to the sheriff on delivery of the property attached is valid at common law. *Palmer* vs. *Vance*, 13 Cal. 557.

SEC. 82. *Bond to Indemnify against Unlawful Act.*—A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him by virtue of an execution in violation of an order enjoining its sale is void, because it is an unlawful contract. The unlawful purpose of the bond may be shown, though on its face it discloses no such unlawful purpose. 28 *Cal.* 641.

SEC. 83. *An Undertaking to procure Release of Attachment.*—An undertaking given to a sheriff to procure a release of goods attached, is for the benefit of the plaintiff who may sue on it, and if the sheriff takes a sufficient statutory undertaking he has no further responsibility. *Curiac* vs. *Packard*, 29 Cal. 194.

SEC. 84. A common-law bond in form upon the prescribed statutory conditions, given to sheriff to procure a discharge of goods attached, is a sufficient compliance with the provisions of the statute. 29 *Cal.* 194.

SEC. 85. *Notice to Sureties on Bond Necessary.*—If a sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the sheriff cannot afterwards have judgment against the sureties on the indemnifying bond upon a notice of five days, unless he gave the sureties written notice of the action brought against him. *Dennis* vs. *Packard*, 28 Cal. 101.

SEC. 86. *Notice to the Indemnifier.*—When a sheriff is indemnified and is sued for the act for the doing of which he is indemnified, he should at once notify the indemnifier of the action, in order to make a judgment against him conclusive evidence against his indemnifier. *Dutel* vs. *Pacheco*, 21 Cal. 438.

SEC. 87. *Bond of Indemnity Judgment first to be Paid.*—If a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments and executions, that shall come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. *Lott* vs. *Mitchell*, 32 Cal. 23.

Keeping of Goods.

SEC. 88. *Sheriff must keep Goods Safely.*—When the sheriff has levied upon goods, he must be diligent to keep them safely, to satisfy the execution; but he is not an insurer, and is not answerable for a loss of the goods by accidental fire. *Browning* vs. *Hanford*, 5 Hill, 588.

SEC. 89. *Place of keeping Goods must be Secure.*—The plaintiff's omission to interfere with the sheriff in his disposition and manner of keeping the property attached is no evidence of an assent to his neglect or violation of the duty imposed upon him by law to take the property and "keep it in a secure place;" so *held* where the property attached was coal on board a vessel which was sunk by a storm which was imminent at the time of the levy, and the sheriff had neglected to remove the coal, and the plaintiff knew of the neglect, but did not interfere to have the coal removed. *Moore* vs. *Westervelt*, 2 Duer. 59.

Conflicting Claims.

SEC. 90. *Conflicting Claims.*—The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving to

the other creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. *Dixey* vs. *Pollock*, 8 Cal. 573.

SEC. 91. *Verdict of Sheriff's Jury on Claim.*—Where property is levied by a constable or sheriff by virtue of an attachment or execution as the property of the defendant in the suit and is claimed by a third party, and a jury is called to try the right of property under the claim, and the verdict of the jury is against the claimant, this verdict is no protection to the officer in a suit brought against him by the claimant, nor is it admissible in evidence as a defense. 28 *Cal.* 122.

SEC. 92. *Claim by Third Parties.*—Where property attached is claimed by a third person, the sheriff may protect himself before a jury of six persons, and if the verdict be in favor of the claimant he may relinquish the levy unless indemnified. *Davison* vs. *Dallas*, 8 Cal. 227.

Writs of Restitution.

SEC. 93. *Forcible Entry in Serving.*—A sheriff is not guilty of a forcible entry, if acting in good faith, by virtue of a writ of restitution he removes from the premises a person against whom the writ does not run and who is not in privity with any one against whom the writ does run. 29 *Cal.* 214.

SEC. 94. *Duty of Sheriff in Serving.*—It is the duty of the sheriff having the writ of *habere facias possessionem*, to remove all persons who come upon the property after the suit was brought, except a person other than the defendant, who is in possession under a title adverse to the defendant. 29 *Cal.* 131.

SEC. 95. If the defendant pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment if it was collusively obtained. 36 *Cal.* 147.

SEC. 96. *Prima facie* all who come into possession of the land, pending the action to recover possession, must go out under the writ of possession if the plaintiff recovers, for

the presumption is that they came in under the defendant. 36 *Cal.* 147.

SEC. 97. *Writ of Restitution.*—A sheriff has no authority by virtue of a writ of restitution to remove from the premises described in the writ persons who were not parties to the judgment on which the writ was issued, and did not enter under defendant in the judgment pending the suit. *Tevis* vs. *Ellis et al.* 25 Cal. 516.

SEC. 98. *Who Cannot be Dispossessed by a Writ of Restitution.*—Where several persons are owners of a tract of land as tenants in common, and the interest of one passes to a purchaser under execution sale, who brings ejectment against the execution debtor alone and recovers judgment, neither the other tenants in common nor their grantees who purchase and enter upon the land pending the suit, can be dispossessed by the sheriff by virtue of the writ of restitution. *Watson* vs. *Dowling*, 26 Cal. 125.

SEC. 99. *Writ of Restitution.*—Where a writ of restitution has been awarded and the sheriff refuses to execute the same, on the ground that the mine is in possession of certain persons not parties to the suit who claim to hold under the corporation, the court will award a peremptory *mandamus* against the sheriff to compel him. *Fremont* vs. *Creppen*, 10 Cal. 211.

N. B.—The writ of restitution referred to in the section above was issued to execute a judgment in a forcible entry and detainer proceeding. It follows from the hypothesis that the plaintiff's verdict is conclusive that he was at the time his possession was disturbed peaceably in the possession of the property. And his peaceable possession is incompatible with the possession of another—with all others. It then was the duty of the sheriff to dispossess all persons found upon the premises and restore the plaintiff to its possession; because the object of the statute is to afford a summary remedy to one whose possession is disturbed by force and violence. The defendant cannot defeat the plaintiff by transferring another to the possession. If he could do so, that person after judgment against him, might plant a third person in his place, and he a fourth, and thus defeat the object of the statute forever.

Sale By.

SEC. 100. *Sale out of the usual course of Execution.*—If the plaintiff direct the deputy sheriff to sell on credit or otherwise out of the usual and regular course of execution, he thereby makes him his special agent, and the sheriff is not liable to the plaintiff in the premises. *Gorham* vs. *Gale*, 6 Cow. 467.

SEC. 101. It is necessary that an execution directing the sale of property should recite the judgment on which the execution was issued, otherwise the sale and a deed of the property sold is void. *Wiseman* vs. *McNulty et al.*, 25 Cal. 230.

Proof of Sheriff's Sale on Payment.—The sheriff's deed executed under a judicial sale for taxes is not *prima facie* or conclusive evidence of his power to sell, but his power to sell, to recite a sale in his deed and to make the deed, must be proven by the judgment and execution. *People* vs. *Doe*, 31 Cal. 220.

SEC. 102. *Sheriff's Certificate of Sale.*—The purchaser of real property at a sheriff's sale who receives the sheriff's certificate of purchase has not a title to the property, but a lien on the same. 30 *Cal.* 135.

SEC. 103. If one who has purchased land at sheriff's sale quit claims his interest in the same before a sheriff's deed is given, the quit claim is equivalent to an assignment of the sheriff's certificate of sale. 31 *Cal.* 591.

SEC. 104. *Sheriff's Sale under Decree of Foreclosure.*—A sheriff has no authority to make sale of mortgaged premises, under a judgment of foreclosure and sale, unless an order of sale is issued upon the judgment and placed in his hands. 30 *Cal.* 367.

SEC. 105. The sheriff must use a reasonable discretion in the sale of goods; it seems that if a very inadequate price be paid for them he should not sell them, but ought to return that they remain in his hands unsold for want of buyers, which is the proper return when he has had no bid. The *fieri facias* being then out of his hands, he must wait until he shall be authorized to sell them by another writ, *venditioni exponas*, and under this writ he will be

obliged to sell at whatever price he can get. *Keightley* vs. *Birch*, 3 Campb. 521.

SEC. 106. By the statute of 1860, personal property levied on by the sheriff, must be actually seized and sold in *presence of the purchaser*, while a lien attaches to real estate upon the filing of the transcript, and the same is to be sold *in front of the court house door;* and all leasehold estates of more than one year are to be so disposed of. 2 *Cal.* 524.

SEC. 107. The fact that a sheriff's sale is open and public, is *prima facie* proof that no advantage is taken by the partner purchasing of his copartner. 19 *Cal.* 120.

SEC. 108. The regularity of a sheriff's sale cannot be impeached by a stranger or in a collateral proceeding. 7 *Cal.* 160.

SEC. 109. Ordinarily, the maxim of *caveat emptor* applies to judicial sales, but it has many limitations and exceptions. 8 *Cal.* 21.

SEC. 110. A sale of property under an order of the probate court is a judicial act, and therefore not within the statute of frauds. 9 *Cal.* 181.

SEC. 111. A substitution of one bidder for another at execution sale, who fails to comply with the terms of sale, cannot affect the validity of the sale. The order directing the sale and the order confirming it give vitality to the purchase. 9 *Cal.* 181.

SEC. 112. *Return.*—On the return day of the *fieri facias*, the sheriff ought to make his return of what he has done under the writ; and should he neglect to do so, he may be called upon by rule to make such a return within a specified time, and if he do not then return it or offer a lawful excuse for not so doing, the court will grant an attachment against him; but in some cases, where there is just cause for it, the court will enlarge the time within which he should make his return. The returns commonly made to a *fieri facias* are the following:

1st. When the sheriff has not found any goods belonging to the defendant on which he could levy, he returns that fact in the common formula, *nulla bona.*

2d. He returns *fieri facias*, when he caused to be made,

out of the defendant's goods, the whole or part of the money which he has ready to be paid to the plaintiff.

3d. That he has taken the goods of the defendant to a certain amount which remain in his hands for want of buyers. In this case, he should be careful to specify what goods he has levied upon, for a general levy may render him responsible for the whole debt.

4th. When he has levied upon land, he should so return and state what lands he has seized, by metes and bounds, so that when they are sold by him, he may make a definite deed for the same. He should also return what further proceedings, if any, have taken place since the levy. 3 *Bouv. Inst.* 582.

SEC. 113. Where an officer by virtue of a second attachment levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession. 29 *Cal.* 312.

SEC. 114. *Liberality of Courts.*—Courts should exercise great liberality in allowing sheriffs to amend their returns, so as to make them conform to the true state of the facts and to correct errors and mistakes. 23 *Cal.* 78.

SEC. 115. *Old Sheriff's Return.*—After the old sheriff is out of office, he cannot return a writ executed by him. The old sheriff should deliver the writ to his successor, who ought to return it into court with the former sheriff's return thereon, and if the new sheriff, before the return day of the writ, let the defendant to bail he should add to the former sheriff's return, stating the fact. *Richards* vs. *Porter*, 7 Johns. 137.

SEC. 116. *Return Day, the Latest.*—The latest period which the law allows for the service of an execution is the return day. *Devoe* vs. *Elliot*, 2 Cal. 243; *Vail* vs. *Lewis*, 4 Johns. 450.

SEC. 117. *Return of Process on the Morning.*—It seems that the sheriff may return the process on the morning of the return day and be excused, though he might have arrested the defendant during the day: *provided*, he had used due diligence before. *Hinman* vs. *Borden*, 10 Wend. 367.

SEC. 118. *Amendments of Return.*—The return of an at-

tachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the collection. 8 *Cal.* 21; 6 *Cal.* 85.

SEC. 119. *On Final Process.*—The general statute defines the duties of the sheriff in respect to final process. It declares that "the sheriff shall execute the writ of *(fieri facias)* by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess, he shall return the same to the judgment debtor." These acts are to be construed *pari materia.* 10 *Cal.* 486.

SEC. 120. Returns by deputy must be made in the name of the sheriff. 23 *Cal.* 401.

SEC. 121. The lien of an attaching creditor cannot be divested by the failure of the sheriff to make a proper return of the writ, and it is not necessary where the levy is made by posting a copy of the writ upon the premises, that the return of the sheriff should show that the premises were at the time unoccupied. *Ritter* vs. *Scannell,* 11 Cal. 248.

SEC. 122. A mistake in the date of the sheriff's return may be corrected at any time. *Ritter* vs. *Scannell,* 11 Cal. 249.

SEC. 123. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud* vs. *El Dorado County,* 12 Cal. 133.

Damages Recoverable of.

SEC. 124. *Liability of Sheriff to Pledgee for Seizing Goods.*—In an action by a pledgee against a sheriff for conversion of goods pledged, the sheriff who has seized them under a lawful writ in his hands will be treated as in privity with the owner, the pledgeor, provided he has pursued the law in making such seizure, and will be held only for plaintiff's special interest in the goods; but in any other event he will be treated as a stranger and held for their full value. 34 *Cal.* 601.

SEC. 125. *Measure of Damages.*—Where he has levied or might have levied upon sufficient property to satisfy the amount indorsed upon the execution, such amount, if not

more than the recovery, is, with interest, the measure of damages, and conclusive upon the sheriff. 19 *Wend.* 79.

SEC. 126. *Assumpsit against Sheriff.*—Assumpsit lies against the sheriff for the amount of goods sold and delivered by him under an execution, though the purchaser refuses to pay for them. *Denton* vs. *Livingston*, 9 Johns. 96.

SEC. 127. *Measure of Damages.*—In an action against a sheriff for wrongfully seizing and selling property under an execution, and when there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps* vs. *Owen*, 11 Cal. 23.

SEC. 128. *Liable for Damages for not Executing Writ.*—The sheriff received a writ of assistance commanding him to put the plaintiff in possession of premises described therein, and went with plaintiff to the premises, but against plaintiff's wishes and protestations refused to execute the writ. On a subsequent day he did execute the writ, but the parties in possession, being the parties named in the writ as defendants, had destroyed fixtures and by willful and malicious acts had injured the premises: *Held*, that the sheriff is liable for the damages thus done; that he is presumed to have known what his duty was and to have acted in willful violation of it, and that he must respond in damages however remote. *Chapman* vs. *Thornburg*, 17 Cal. 87; 18 *Cal.* 689; 26 *Cal.* 514.

Forms for Sheriffs or Constables in Criminal Cases.

No. 1.—*Indorsement on Warrant*

..... township, } ss.
county of ....., }

It appearing satisfactory to me by the oath of .... that the signature of .... to the within warrant is in the handwriting of said ...., the justice of the peace within-mentioned, I do therefore hereby authorize ...., the person bringing this warrant, or any other officer to whom such warrant may be directed, to execute the same in said county of ....

....
Justice of the peace of ..... township, ... county.

No. 2.—Admission of Receipt of Process by the Sheriff.

The people
against
.... :

Bench warrant of .... county against the defendant upon an indictment in said county for ....

Dated .....

Received by me for execution ...., 18..

...., sheriff.

No. 3.—Return where the Magistrate issuing the Warrant has Gone Out of Office.

I have arrested the within defendant, as I am within commanded; and I further return, that at the time of such arrest, ..., the magistrate issuing the within warrant, had ceased to be such magistrate by the expiration of his term of office [or, "by resignation of his said office," or, "removal from office," or, "removal from the town or county"].

Dated ...., sheriff.

No. 4.—Return where the Magistrate issuing the Warrant is Absent.

I have arrested the within defendant, as I am within commanded; and I further return, that on making such arrest I forthwith brought the said defendant to the office of the magistrate before whom the within warrant is made returnable, but that said magistrate was then absent therefrom and could not be found to proceed on the said warrant.

...., sheriff.

No. 5.—Return to Warrant on Arrest of Criminal.

I have arrested the within-named defendant, and have him now here in my custody, as I am within commanded.

Dated .....

...., sheriff,
[or ...., sheriff,
by ...., deputy,
or ...., constable].

No. 6.—Return of Arrest and Rescue.

I arrested the within defendant as I am within commanded, but the said defendant, before he could be conveyed to jail, forcibly rescued himself, on [*etc.*, at *etc.*], and escaped out of my custody, and since the said defendant is not found in my county.

....,
Sheriff of .... county.

No. 7.—Return of Arrest, and that Defendant is Sick.

I have arrested the within defendant, who at the time of his arrest and

still, on this .... day of ...., 18.., at last day of the return of this order [or, "execution," or, "warrant," or, "*ne exeat*"], is so sick that from fear of his death I cannot have him as I am within commanded.

Dated ....,
Sheriff of .... county.

No. 8—Return to such Warrant where the Defendant desires to be let to Bail in the County where Arrested.

I have arrested the within defendant in pursuance of the within warrant and of the indorsement thereon.

Dated ....,
Sheriff of .... county.

No. 9.—Return where all the Defendants cannot be Found.

I have arrested the within-named ...., and have him now here in my custody as I am within commanded; but the within-named .... cannot be found.

...., sheriff.

No. 10.—Return of Arrest under Order, and of holding to Bail.

I have arrested the within defendant pursuant to the within order, and at the same time delivered to him a copy thereof, and of the affidavit on which the order was granted; and have taken from said defendant the undertaking of ..... [here state occupation], residing in ...., and ...., residing in same place, a copy of which, duly certified by me, is returned herewith.

Dated ....,
Sheriff of .... county.

No. 11.—Return where the Defendant is Committed for want of Bail.

I have arrested the within defendant pursuant to the within order, and have him in my custody in the common jail of the county of ...., for want of bail.

...., sheriff.

No. 12—Return where Defendant makes a Deposit instead of Bail.

I have arrested the within defendant pursuant to the within order, and at the same time delivered to him a copy thereof and of the affidavit on which the order was granted, and I have received from said defendant the sum of .... dollars instead of bail, and have deposited the same with the county clerk of .... county.

....,
Sheriff of .... county.

No. 13—Certificate of Deposit of Amount instead of Bail.

[Title of action.]

The above defendant having been arrested by me under and pursuant to an

order of .... requiring such defendant to be held to bail in the sum of .... I hereby certify that I have received from said defendant the said sum of .... instead of bail.

Dated ...., sheriff.

No. 14.—*Certificate of Clerk or Justice of Deposit with Him.*

[Title.] }

I certify that ...., sheriff of the county of ...., has this day paid into court the sum of .... dollars, being the amount mentioned in the order of arrest in this action.

....
Clerk of .... county.

No. 15.—*Invitation to Attend the Execution of a Criminal.*

SIR: Pursuant to the statute in such case, you are hereby invited to be present at the execution of .... at the jail of said county in ...., on the .... day of ....

Dated ...., sheriff.

To Hon. .....

Forms in Civil Cases.

No. 16.—*Return to Search-Warrant.*

I have executed the within search-warrant, as I am within commanded, by making diligent search in the place designated in the said warrant for the goods therein described, but cannot find the said goods or any part thereof [or have found said goods and have them now here, as I am within commanded].

Dated ....,
Sheriff of .... county.

No. 17.—*Return to a Warrant.*

I have arrested the defendant and have him in custody before the court and have notified [or not notified] the plaintiff.

Dated .....

Fees, ..., constable.

No 18.—*Admission of Receipt of Civil Process.*

..... Court.

...., }
against }
.... }

Execution for $ ...., on a judgment rendered and docketed in .... county, with directions indorsed to levy and collect $ ...., and interest from ...., besides fees [or summons and complaint and copies].

Dated .....

Received by me this .... day of ...., 18.., at .... o'clock.

...., sheriff.

No. 19.—*Return of Rescue and Resistance to an Execution.*

State of ....., } ss.
..... county, }

I, the sheriff of said county, do certify and return to the .... court now here, that by virtue of the within execution, to me directed and delivered for execution, I did on the .... day of ...., at ...., in said county, duly levy upon and take possession, certain goods and chattels of the defendant, to wit: ....; and while I had the same in my possession, as aforesaid, and while taking an inventory thereof, I was violently assaulted and resisted by the within-named defendant, and by ...., and ...., then and there present, aiding and abetting him, the said defendant, and that the said .... then and there violently seized and carried off the said goods and chattels and rescued the same from such levy, and that I have been unable to obtain possession of the same.

Dated .....

....,
Sheriff of .... county.

No. 20.—*Return to Process that Defendant cannot be Found.*

The within defendant cannot be found in my county.

...., sheriff.

This return will be a proper return to all process where the defendant cannot be found, whether it be to a summons, judge's order, attachment, *ca sa* or *ne exeat.*

No. 21.—*Notice of Justification of Bail.*

[Title of action.] }

Sir: Take notice, that the bail in the undertaking taken on the arrest of the defendant in this action will justify before the Hon. ...., county judge of .... county, at his office in ...., on the ... day of ...., at .... o'clock in the forenoon.

Dated .....

...., sheriff.

To ...., attorney for plaintiff.

No. 22.—*Return to Execution of Nulla Bona.*

The defendant has no goods or chattels, lands or tenements, within my county, whereof I can make the amount of the within execution or any part thereof.

Dated .....

Fees, ...

....,
Sheriff of .... county.

No. 23.—*Where Part is Made, and Nulla Bona for the Residue.*

I have made the sum of ...., part of the moneys directed to be made upon the within execution, and I can find no goods or chattels, lands or tene-

ments, of the within defendant in my county, whereof I can make the balance of the said execution.

....,
Sheriff of .... county.

No. 24.—Where the Whole is Made.

I have made the amount of the within execution out of the goods and chattels, lands and tenements, of the within defendant, which I have ready at the day and place within mentioned, to render to the within plaintiff, as I am within commanded [or, "have paid the same to the within plaintiff," or, "have paid the same into court," or, "satisfied"].

Dated .....

....,
Sheriff of .... county.

No. 25.—Where Goods Remain Unsold for want of Bidders.

I have levied on goods and chattels of the defendant, under the within execution, which remain on hand for want of bidders; therefore, I cannot have the moneys at the day and place within mentioned, as I am within commanded.

....,
Sheriff of .... county.

No. 26.—Nulla Bona where but one of two Joint Debtors are Served.

I can find no goods or chattels, lands or tenements, of the within defendant, ..., in my county, and no goods or chattels of the defendant, ..., owned by him jointly with the said ...., of which I can make the amount of the within execution or any part thereof.

Dated .....

....,
Sheriff of .... county.

No. 27.—Nulla Bona against an Executor or Administrator.

The within defendant has no goods or chattels of the within-named deceased which were, at the time of his death, in his hands to be administered, in my county, whereof I can cause to be made the damages within mentioned or any part thereof.

Fees, ...

....,
Sheriff of .... county.

No. 28.—Return to Execution Stayed by Appeal Before Levy.

I certify and return, that after the delivery of the said execution to me and before levy thereunder, the execution of the same was stayed, by appeal; whereupon I could not have the moneys within-mentioned at the return day of such execution, as I am within commanded.

Fees, ...

....
Sheriff of .... county,

No. 29.—When Stayed by Appeal or Injunction after Levy.

After the receipt of the within execution by me, I levied in due form of

law upon certain goods and chattels of the defendant; but before sale thereof, the execution was stayed by appeal [or, "by injunction"]; therefore, I could not make the within moneys by the day within-mentioned: nevertheless, I have the said goods and chattels in my custody, to answer to the within execution when said appeal shall be determined [or, "said injunction is removed"].

....,
Sheriff of .... county.

No. 30.—*Return when Judgment or Execution is Vacated.*

After the receipt of the within execution by me, I levied in due form upon certain goods and chattels of the defendant; but before sale was served with an order of this court, duly certified by the clerk of .... county, vacating the said judgment [or, "setting aside the execution"]; therefore, I have released the said goods and chattels from the said levy, and cannot have the within moneys at the day and place within-mentioned, as I am within commanded.

....,
Sheriff of .... county.

No. 31.—*Return of Levy and Sale when there is a Controversy as to Title of the Property.*

On the receipt of the within execution, I levied in due form of law upon the following property, then in the possession of the defendant, in my county, to wit: ....; and that on the .... day of ...., at ...., in said county, I sold the following part of such property, to wit: ...., whereby I realized sufficient to pay the within execution, with interest and fees of levy and sale; and thereupon I returned to the defendant the balance of said property, to wit: ....

Dated .....

....
Sheriff of .... county.

No. 32.—*Return of an Execution Satisfied.*

I have the amount of the execution of the goods and chattels of the defendant [or, "satisfied"].

...., constable.

[*Satisfied in Part.*]

I have made the sum of ...., of the goods and chattels of the within defendant, and can find no other goods and chattels of said defendant, whereof I can make the remainder of the said execution.

Dated .....

...., constable.

No. 33.—*Return where Goods Remain Unsold.*

Levied on ....., the property of the within defendant, which remains in my possession unsold, for want of bidders.

[*Where Appeal is Brought.*]

Proceedings stayed by appeal.

No. 34.—Where Goods Levied on are Replevied.

After the coming to me of the within execution, I levied in due form of law upon certain goods and chattels of the within defendant; but before the sale thereof the same was replevied and taken out of my custody by ...., one of the coroners of the within county, at the suit of ...., and I can find no other goods or chattels, lands or tenements, of the within defendant in my county, whereof to make the amount of the within execution or any part thereof.

....,
Sheriff of .... county.

No. 35.—Return where the Moneys Realized have been Applied to the Payment of Other Liens.

I levied on certain goods and chattels of the defendant under and by virtue of the within execution, and duly sold the same; on [or, "after"] such sale I was duly notified that .... had a lien and claim upon the said goods and chattels to the amount of .... dollars, for work and labor bestowed upon the same, and that I paid and discharged said lien and have applied the balance of the proceeds of said sale, to wit: .... dollars, on this execution; and I can find no goods or chattels, lands or tenements, of the defendant whereof I can make the amount of the within execution or any part thereof.

....,
Sheriff of .... county.

No. 36.—Notice of Claim by a Third Person.

[Title of action.]

SIR: Take notice that .... claims the property taken by me under the order in this action, and has made affidavit of his title thereto and right to the possession thereof and of the grounds of such right and title, and served the same on me, and that I do therefore require to be indemnified by the plaintiff against such claim, and in default of such indemnity I shall not deliver such property to the plaintiff nor keep the same.

Dated .....

....,
Sheriff of .... county.

To ...., plaintiff's attorney.

No. 37.—Receipt for Property Levied on.

[Title of action.]

Execution for .... dollars and interest from ...., besides sheriff's fees, received by me ...., 18.., for execution.

I have levied upon the following property upon the premises of the defendant and in his possession, under said execution, to wit: .....

....,
Sheriff of .... county.

I hereby acknowledge that I have received the above-described property,

so levied upon by the sheriff, and hereby promise and undertake to return the same and every part thereof to the said sheriff, on demand, or pay the above judgment and sheriff's fees.

[Signed] ....

Dated .....

By Constable.

No. 38.—Return to Summons Personally Served.

Personally served on the .... day of ...., 18.., by delivering a copy to the defendant, at .....

Fees, ..., constable.

No. 39.—Inventory of Goods Attached.

Inventory of goods attached by me, under and by virtue of the within [or, "annexed"] attachment, this .... day of ...., 18.., to wit: .....

...., constable.

No. 40.—Inventory when Articles are Numerous.

Inventory of goods and chattels levied on this .... day of ...., and taken into my custody by virtue of the annexed execution, viz: .....

...., constable.

No. 41.—Indorsement on Execution when Articles Levied on are Numerous.

I have levied, this .... day of ...., 18.., by virtue of the within execution, upon the goods and chattels of the defendant, mentioned in the annexed inventory.

...., constable.

No. 42.—Certificate of Constable of Attachment and Inventory.

I certify that the within is a copy of the attachment issued by .... and to me directed and delivered; and also of the inventory of the property seized by virtue thereof, and by me, this day, ...

Dated .....

Fees, ..., constable.

No. 43.—Return to Attachment.

I certify that on the .... day of ...., I attached and took into my possession and custody, all the personal property of the defendant to be found in my county [or, "certain personal property of the defendant"], and that immediately thereupon I made] an inventory of the property so attached which is indorsed hereon [or, "is hereto annexed"], and served a copy of the within attachment and inventory, duly certified by me, upon the within defendant personally [or as the case may be].

...., constable.

No. 44.—Return to a Venire.

I certify that by virtue of the within precept I have personally summoned as jurors the several persons named in the annexed list.

Dated ...., constable.

No. 45.—Indorsement of Levy on Execution.

Levied by virtue of the within execution this .... day of ...., 18.., on ...., the property of the defendant, on his premises in ....

...., constable.

CHAPTER LXXXII.

STOPPAGE IN TRANSITU.

SECTION 1. This is the name of that act of a vendor of goods upon a credit who, on learning that the buyer has failed, resumes the possession of goods while they are in the hands of a carrier or middleman in their transit to the buyer, and before they get into his actual possession. *Bouv. Dict.* 531.

SEC. 2. The right of a vendor to a stoppage *in transitu* exists until the goods sold arrive at their final destination or come into the possession of the consignee. 7 *Cal.* 213. Depositing the goods with agent to be forwarded does not terminate the *transitu*. 7 *Cal.* 213. And this may be done where the vendor disposes of his goods to one who is insolvent upon a credit. He has a right to stop them before the purchaser obtains the possession of them. 23 *Cal.* 508; 37 *Cal.* 630. As a lien it is paramount to any other lien on the goods which may be claimed by third persons, in whatever manner obtained. 23 *Cal.* 508.

SEC. 3. If the goods be in the possession of a carrier, and the vendor demand them, the carrier will be liable to the vendor if he refuse to deliver them. Nor is an express demand of the carrier necessary, so he be clearly informed that the vendor wishes to retake them. If the goods be in possession of an agent of the carrier, notice to him is notice to the carrier. A letter by the vendor to the agent of the carrier in possession of the goods, giving a bill of particulars and directing the agent of the carrier to deliver them to his agent, is sufficient to charge the carrier for a conversion. 37 *Cal.* 630.

CHAPTER LXXXIII.

SUNDAYS.

SECTION 1. Barbarous and noisy amusements were prohibited by the act of March 16th, 1855 (50), which in said act are enumerated, "as getting up or aiding in getting up, or opening of, any bull, bear, cock or prize, fight; horse race, circus, theater, bowling alley, gambling house, room or saloon, or any place of barbarous or noisy amusements," on the Sabbath day. The violation of the law is a misdemeanor, for the trial of which justices have jurisdiction, and parties found guilty shall be punished by fine not less than ten nor more than fifty dollars.

SEC. 2. By the act of May 20th, 1861 (655), all stores, workshops, bars, saloons, banking-houses or other places of business for the transaction of business therein, except hotels, boarding-houses, restaurants, taverns, livery stables, retail drug stores, and such manufacturing establishments as are necessarily kept in continual operation to accomplish the business thereof, and except the sale of milk, fresh meats, fresh fish and vegetables, must be closed on Sundays. Violations of this act shall be punished by fine of not less than five nor more than fifty dollars, and the offender may be prosecuted either by complaint or indictment by a grand jury, and all fines collected shall be paid into the common school fund. This act was decided constitutional. 18 *Cal.* 678.

SEC. 3. By the act of March 27th, 1862 (90), all places for the sale of meats, game and vegetables, or other market products, are to be kept closed in the city and county of San Francisco, and any person who, either by himself or his agent, violates this law shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine of fifty dollars for each and every offense, to be recovered as other fines for misdemeanors are recoverable by law, and by imprisonment until fine is paid.

SEC. 4. By the act of May 2, 1862 (479), all bath houses, barber shops and hair-dressing saloons, in the city of San Francisco must be closed at the hour of one o'clock P.M. of

the Sabbath day, and any person who, by himself, agent or servant, either directly or indirectly, violates this law is deemed guilty of misdemeanor, and upon conviction shall be fined not less than fifty nor more than two hundred dollars, to be recovered as in the preceding section.

SEC. 5. For all judicial purposes Sunday is no day at all. 13 *Cal.* 341.

SEC. 6. *Act concerning Habeas Corpus.*—Any writ or process authorized by this act may be issued and served on the first day of the week, commonly called Sunday. *Gen. Laws*, 5453.

SEC. 7. Contracts made in this state on Sunday are not void because made on Sunday. 26 *Cal.* 514.

CHAPTER LXXXIV.

SURETIES.

	SECS.		SECS.
SURETIES	1–2	JUSTIFICATION OF SURETIES	4
ALLOWANCE OF UNDERTAKING	3	QUALIFICATION OF	5

Sureties.

SECTION 1. When a surety undertakes that his principal shall pay any judgment recovered against him or do a specific act, the judgment against the principal is conclusive against the surety. But in the case of official bonds the sureties undertake in general terms that the principal will perform his official duties; and a judgment against the officer, in a suit to which they were not parties, is not evidence against them. That the sureties had notice of the suit against the principal amounts to nothing, unless it was notice according to the statute or unless they appear voluntarily as parties to the record. According to the common-law rules, a plaintiff cannot, by mere notice, bring in parties not sued in action for trespass when there is no pretense that they were trespassers. *Pico* vs. *Webster*, 14 Cal. 202.

SEC. 2. In suit on a recognizance for the appearance of a party charged with crime, the sureties cannot set up as a defense the fact that the amounts in which they justified

were insufficient under the statutes. The justification is no part of their contract. 18 *Cal.* 121.

Allowance of Undertaking.

SEC. 3. If the justice find the sureties sufficient he shall annex the examination to the undertaking, indorse his allowance thereon and file the same, and the officer shall thereupon be exonerated from liability. *Gen. Laws*, 5500.

Justification of Sureties.

SEC. 4. For the purpose of justification, each of the sureties shall attend before the justice at the time mentioned in the notice, and may be examined on oath on the part of the adverse party touching his sufficiency, in such manner as the justice in his discretion may think proper. The examination shall be reduced to writing and subscribed by the sureties if required. *Gen. Laws*, 5499.

Qualification of Sureties.

SEC. 5. The qualification of sureties on the several undertakings required by the statute concerning arrest, attachment and the claim of the delivery of personal property, shall be as follows:

1st. Each of them shall be a resident and householder or freeholder within the county.

2d. Each shall be worth double the amount stated in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from taxation. *Gen. Laws*, 5498.

CHAPTER LXXXV.

TENDER.

SECTION 1. *Tender and Payment of Money into Court.*—The statutes contain the following provision on this subject: When, in an action for the recovery of money only, the defendant alleges in his answer, that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits

in court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff shall not recover costs, but shall pay costs to the defendant. *Pr. Act* 506.

SEC. 2. In making the payment into court, the defendant should be careful to pay a sufficient sum to defray the costs at the time incurred. Generally, this can be done by obtaining from the justice the amount of his and constable's fees, and adding these to the expense of obtaining the attendance of the plaintiff's witness, and pay in the aggregate of the whole. After the money is thus paid into court, the defendant may answer, stating the payment, and may avail himself of the payment, the same as if paid to the plaintiff before suit was brought (3 *Cow.* 336), or he may interpose an answer, confessing the cause of action to the extent of his payment, alleging that to have been made, and such other defense as he pleases as to the residue. If the defendant pay money into court in a case where he is not allowed by law to do so, the plaintiff, by taking it out, will thereby waive the irregularity, and the effect of it will then be the same as if it had been paid in on a mere money demand. The defendant may pay money into court upon one or more of several distinct causes of action in a complaint, but he cannot pay it on part of a cause of action. *Gra. Pr.* N. Y., 2 ed. 532, and the cases there cited.

SEC. 3. *Proceedings after Payment.*—Where money has been paid into court, the plaintiff may in all cases take it out, and then either accept it in satisfaction of his debt or may proceed in his action. No question of costs can in such case arise so far as the plaintiff's liability to the defendant is concerned, even though the plaintiff proceed and is defeated in his action, for he has already received the costs up to the time of payment, and he cannot be compelled to refund. If the judgment be in favor of the defendant, the statute gives him his costs of defense subsequent to the time of payment.

SEC. 4. If the plaintiff proceed to trial and do not prove himself to have been entitled to an amount beyond the sum paid into court, he may be nonsuited, or have final judgment go against him, with costs, as in other cases.

But if he wish to discontinue the action before trial having proceeded in it after the money was paid in, he may do so on payment to the defendant and the costs he may have incurred after the payment, or he may discontinue as in other cases, suffering judgment for costs to go against him.

SEC. 5. *Effect of Payment into Court.*—The rule is, that payment of money into court admits the cause or causes of action stated in the complaint to the amount paid in and nothing more. Beyond that amount the defendant may make his defense; and hence, where a complaint contained several distinct claims and the money was paid in—generally, it was *held*, that the defendant was not thereby precluded from going into evidence to show the total failure of the consideration of one of the claims in bar of the action or a partial failure in mitigation of damages. 2 *Wend.* 431.

SEC. 6. The payment of money into court is, so far as proceedings in justices' courts are concerned, very much the same thing as a *tender after suit is brought.* In the former case the money is paid to the justice; in the latter, directly to the plaintiff. An answer setting up a tender before the action was commenced, may be in the following words: "As to the claims of the plaintiff, except .... dollars (the amount tendered) of the amount, the defendant avers he is not indebted to said plaintiff as he hath complained; and as to said .... dollars, he says that after said .... dollars became due and before the commencement of this suit, to wit: on, etc., he was ready and willing and offered and tendered to pay to the plaintiff the sum of .... dollars, to receive which, the plaintiff then and there refused; and the defendant has always before and at and since the time of the said tender and refusal, been and still is ready to pay to the plaintiff the said .... dollars, and now brings the same into court, ready to be paid to him."

SEC. 7. In like manner a tender may be pleaded to part and a set off to the balance or a payment or the statute of limitations, and these pleas may be to the whole complaint or to any separate cause of action thereon. In making a tender it is not enough to say "I am ready or I am willing

to pay you the debt," "or dollars." The amount must be actually produced by the hand of the tenderer, unless he be expressly told by the tenderee not to produce it. The conduct of the tenderee may, however, dispense with the necessity of its actual production, as when for some reason which he assigns, says: "You need not produce it; I will not accept the amount." It is always, however, safest to produce the money and offer it, and do it in such manner as to be able to prove the act and the amount.

SEC. 8. On the subject of a tender by the vendee to obtain specific performance of contract, it is held in *Duff* vs. *Fisher* (15 Cal. 375), that the tender must be stated with particularity as to time. It is not only necessary to aver a tender, but the pleader must aver his then and continuing willingness to pay the amount tendered, and he must bring the money into court. 28 *Cal.* 238; 25 *Cal.* 502; 34 *Cal.* 616; 30 *Cal.* 486; 26 *Cal.* 420.

CHAPTER LXXXVI.

TIME.

SECTION 1. Perhaps no class of questions has given rise to so much verbal criticism as cases regarding the mode of computing time. The day of the date is now excluded in the computation of time on notes and bills of exchange. Of late, the general rule of construction seems to have been to exclude the first day. It would be impracticable to lay down any rule in advance applicable to every case that may arise. When the entire validity of an instrument or a title must fail and the true intention of the parties be defeated unless the first day be included, then it should be done. But when a certain time for deliberation is given, the exclusive rule should be adopted. There is no uniform rule for the computation of time, whether we reckon from an event or a date; the courts generally including or excluding the first day, as it was necessary to give effect to contracts and carry out the intention of the parties. 8 *Cal.* 415, 417.

SEC. 2. It is a general rule that where a statute specifies

the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory merely, unless the nature of the act to be performed or the language of the legislature shows that the designation of the time was intended as a limitation of the power of the officer; thus, where an act requires a sheriff to file a certificate of sale within ten days, his omission or neglect to do so within the specified time does not affect the validity of the sale, and where a statute requires an act to be done by an officer within a certain time for a public purpose, though he neglect his duty by allowing the precise time to go by, if he afterwards perform, the public shall not suffer by the delay. But it is otherwise where the delay does not affect the rights of third parties, but the party's own right, as where a party elected to an office fails to qualify by taking the oath and filing the bond at the time and in the manner required by law. 3 *Cal.* 126, 127.

SEC. 3. A day is not to be considered a unit to the prejudice of the rights of a party, and an examination should be had of the very point of time when an act was done. Most of the fiction about time and the computation of time is not now recognized as law, and especially by the supreme court of California. 1 *Cal.* 416.

SEC. 4. Whenever time becomes important courts will inquire into a day or even a fractional portion of a day. 14 *Cal.* 571.

CHAPTER LXXXVII.

TRANSFER OF ACTION.

	SECS.		SECS.
TRANSFER OF ACTION TO DISTRICT COURT	1-2	AFFIDAVIT TO TRANSFER	4
TRANSFER OF ACTION TO OTHER JUSTICE	3	FORM OF AFFIDAVIT	5-6

Transfer of Action to District Court.

SECTION 1. The parties shall not be at liberty to give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost,

assessment, toll or municipal fine, nor shall any issue presenting such question be tried by said justice; and if it appear from the plaintiff's own showing on the trial or from the answer of the defendant verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property or the legality of any tax, impost, assessment, toll or municipal fine, the justice shall suspend all further proceedings in the action and certify the pleadings, or if the pleadings be oral a transcript of the same, from his docket to the district court of the county, and from the time of filing such pleadings or transcript with the county clerk the district court shall have over the action the same jurisdiction as if it were commenced therein. *Gen. Laws*, 5512.

SEC. 2. When the determination of an action involves the question of title or possession to real property, the justice cannot exercise jurisdiction. Whether this appears from the plaintiff's own showing or from the answer of the defendant, verified by his oath, the justice must certify the pleadings to the district court for trial. The amount involved has no effect upon the question of jurisdiction; it is the fact that the title to real property is involved that determines it. In opening jurisdiction the district court must be governed by the whole record, and all the presumptions are in favor of the validity of the proceedings, and no objection growing out of the amount involved can affect the jurisdiction. *Cullen* vs. *Langridge et al.*, 17 Cal. 68; *Holman* vs. *Taylor*, 31 Cal. 338; *Larue* vs. *Gaskin*, 5 Cal. 507; *Doherty* vs. *Thayer*, 31 Cal. 140. The granting or refusing a change of venue cannot be received in an application for a *mandamus*. By this writ the justice may, in case of his refusal, be compelled to act, but his erroneous action cannot be thus corrected. The remedy is by appeal. *Flagley* vs. *Hubbard*, 22 Cal. 34.

Transfer of Action to other Justice.

SEC. 3. If at any time before the trial it appear to the satisfaction of the justice before whom the action is brought, by affidavit of either party, that such justice is a material witness for either party, or if either party make affidavit that he has reason to believe and does believe that he can-

not have a fair and impartial trial before such justice, by reason of the interest, prejudice or bias of the justice, the action may be transferred to some other justice of the same or neighboring township; and in case a jury be demanded and affidavit of either party is made that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action may be transferred to some other justice of the peace in the county; but only one transfer shall be allowed to either party. The justice to whom an action may be transferred by the provisions of this section shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The justice ordering the transfer of the action to another justice shall immediately transmit to the latter, on payment by the party applying of all the costs that have accrued, all the papers in the action together with a certified transcript from his docket of the proceedings therein. The justice to whom the case is transferred shall issue a notice stating the time and place when and where the trial will take place, which notice shall be served upon the parties by any officer authorized to serve process in justice's court or by any person specially deputied by the justice for that purpose, at least one day before the trial. *Gen. Laws*, 5513.

Affidavit for Transfer.

SEC. 4. The affidavit for a change of venue should state facts in such a manner as to enable the court to draw its own inference whether an impartial trial can be had in the particular case, admitting that a prejudice does exist in the community against the defendant. 3 *Cal.* 413.

Form of Affidavit.

SEC. 5. The following is a form of affidavit for transfer of action:

In the justice's court of the .... township, in the county of ...., state of....

...., plaintiff,
against
...., defendant.

State of ....., county of ..... } ss.

...., ..., of said county, being duly sworn, says: That he is the defend-

ant in the above entitled action; that he has reason to believe and does believe, that he cannot have a fair and impartial trial before the justice before whom this action is brought, by reason of the interest, prejudice and bias, of the said justice [or, "that said justice is a material witness for the said defendant," or, "the plaintiff in said action," or in case a jury has been demanded, "that said affiant cannot have a fair and impartial trial on account of the bias and prejudice of the citizens of the above-named township against him"].

....

Subscribed and sworn to before me this .... day of ...., A.D. 18...

....,
Justice of the peace of said township.

SEC. 6. The following is a form of notice of time and place of transferred action:

In the justice's court of .... township, in the county of ...., state of ....

....,
plaintiff,
against
....,
defendant.

To ...., the plaintiff in the above-entitled action, and ...., the defendant in said action:

You will please take notice, that the said action, transferred to the above-entitled court from the justice's court of .... township, in the county of...., is set for trial before me, at my court-room in said .... township, in said .... county, on ...., the .... day of ...., A.D. 18.., at .... oclock, ..M.

Dated .....

....,
Justice of the peace of said township.

CHAPTER LXXXVIII.

TRESPASS.

SECTION 1. In considering injuries referred to in this chapter, it must be remembered that the rules and laws which will be invoked, have not a less binding force upon courts of the most limited than upon those courts of the most extended jurisdiction. Under the ancient system of pleading, cases embraced in the classification "trespass" found remedies in actions known by that system, as trespass, trespass on the case, detinue and replevin. With the abolition of the ancient forms of action, under and by which the remedies furnished by each were sought,

the "civil action" or a plain and "concise statement of the facts constituting the cause of action" was inaugurated—much more simple in practice, but none the less efficacious in its remedial agency.

SEC. 2. The subdivisions of the subject indicated in their enumeration are as follows:

1st. Actions for injuries to the person.

2d. Actions for injuries to real property.

3d. Actions for taking, detaining or injuring personal property.

4th. The rights and liabilities of persons acting under color of law or legal process.

1.—*Actions for Injuries to the Person.*—Justices have no jurisdiction of actions for assault and battery, false imprisonment, libel, slander, malicious prosecution and seduction, or of cases of willful *direct* injury to the person, but are limited to cases where the injury is a consequence of some wrongful or negligent act; such act may be committed by the defendant or his servant or agent, the general rule being that where any one does an act either personally or by his servant which is unlawful, or if it be lawful, if he does it in such a careless and negligent manner that injury results to others he is responsible for it. If the matter complained of be the result of *gross* neglect, the defendant will be liable, even though the plaintiff in some degree contributed to it. Thus, if the defendant with his horse and cart ran against another on a dark night and injure him—if he did so by driving on the wrong side of the road or street, he is guilty of gross neglect; or, where an aged or lame man or an infant be in a road or street in the day time, when he could see objects in his way, and he run against them and injure them, he will be *prima facie* guilty of *gross* neglect. The defendant in such case could defend himself only by showing that the act was not voluntary or willful on his part. 21 *Wend.* 615. Accidents which may be the result of a slight degree of negligence may be actionable, as where a man builds a wall so unskillfully that it falls and injures another, or where he digs a pit in the highway into which another falls. A master may be liable for injuries occasioned by

the negligence of his servant, except it be the result of a willful or malicious act of the servant. If, however, it be the wrongful, willful act of a servant of a common carrier of passengers, the owner of the carriage will be responsible for injuries the passengers may suffer. 19 *Wend.* 343. Where an injury is sustained from an animal known by the owner to be dangerous he will be liable, although he may have used means to secure it, if the means employed were ineffectual. Every man may keep a dog for the protection of his house and may cautiously use him for that purpose, and if any one go into his yard at night and be bitten no action will lie; but when a person keeps a ferocious dog and knowingly permits him to worry people passing on a road leading by his premises or even passing over his fields in day time, although technical trespassers, the owner has been held liable for injury committed by him. 19 *Wend.* 496.

2.—*Actions for Injuries to Real Property.*—This class of actions may be maintained for any injuries which may be committed to real estate, whether direct or consequential; and in all cases where an unlawful and wrongful act is committed upon the real property of another the law implies an injury, and in an action for it nominal damages must be given. 1 *Rawle*, 27.

3.—*Of Actions for Taking, Detaining or Injuring Personal Property.*—The term personal property includes moneys, goods, chattels, things in action and evidences of debt, and with the exception of real estate, it includes everything in which one may have a valuable interest. This interest may exist in domestic animals of the lowest as well as of the highest grade, as cats, dogs or poultry, or even in animals of a wild nature which have been tamed, or if they have only been captured he has an interest in them until they regain their liberty. Where personal property belongs exclusively to any person he is said to have a general property in it. Where he holds goods as a bailee or has only a temporary interest in it, he is said to have a special property in it. In either case he may maintain an action either for taking, detaining or injuring it.

4.—Persons acting under color of law or legal process

have an interest in property which entitles them to maintain an action for injury done to it. Their interest in it may be only temporary, but they may maintain an action against any one who takes, detains or injures it, and proof of the execution and levy is sufficient to sustain this action without showing the judgment.

CHAPTER LXXXIX.

TRIAL.

	SECS.		SECS.
TRIAL, GENERALLY	1- 4	QUALIFICATION OF JURORS	23-25
IN WHAT TOWNSHIP OR CITIES ACTIONS TO BE BROUGHT	5-12	PEREMPTORY CHALLENGE	26-27
RIGHT OF TRIAL BY JURY	13-15	CHALLENGE FOR CAUSE	28-30
WHEN A JURY SHALL BE DEEMED WAIVED	16-17	DUTY AND POWER OF JURY	31
WRIT OF VENIRE AND IMPANELING JURY	18-22	PROVINCE OF JUSTICE AND JURY	32-39
		POLLING THE JURY IN CIVIL CASES	40

Trial, Generally.

SECTION 1. Parties should not be held to any great strictness in proceedings before justices of the peace. 23 *Cal.* 138.

SEC. 2. A liberal, and not a restricted construction, will be given to the proceedings of justices. 5 *Humph.* 581.

SEC. 3. Where the trial by jury is dispensed with, the justice must, nevertheless, observe the course of the common law in trials. 3 *Murph.* 121.

SEC. 4. The court not only performs its peculiar and appropriate duty of deciding the law, but also discharges the functions of a jury and passes upon the facts. If counsel desire to present for consideration certain points of law as applicable to the facts established, or sought to be established, upon which the court might be called to charge a jury were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points—or, counsel contends as follows. 20 *Cal.* 163.

In what Townships or Cities Actions to be Brought.

SEC. 5. No person shall be held to answer to any summons issued against him from a justice's court, in civil action, in any township or city other than the one in which he shall reside, except in the cases following:

1st. Where there shall be no justice's court for the township or city in which the defendant may reside or no justice competent to act on the case.

2d. When two or more persons shall be jointly or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county or in different counties, the plaintiff may prosecute his action in a justice's court of the township or city in which any of the debtors or other persons liable may reside.

3d. In cases of injury to the person or to real or personal property, the plaintiff may prosecute his action in the township or city where the injury was committed.

4th. Where personal property unjustly taken or detained is claimed or damages therefor are claimed, the plaintiff may bring his action in any township or city in which the property may be found or in which the property was taken.

5th. When the defendant is a non-resident of the county, he may be sued in any township or city wherein he may be found.

6th. When a person has contracted to perform any obligation at a particular place and resides in another county or in a township or city of the same county, he may be sued in the township or city in which such obligation is to be performed or in which he resides; and for the purpose of justices' courts' jurisdiction under this clause, the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary.

7th. When the foreclosure of a mortgage or the enforcement of a lien upon personal property is sought by the action, the plaintiff may sue in the township or city where the property is situated.

8th. Any person or persons residing in the city of San

Francisco may be held to answer to any summons issued against him or them from the court of a justice, for any township within the corporate limits of the city of San Francisco, in any action or proceeding whereof justices of the peace of the city or county of San Francisco have or may have jurisdiction by law: *provided*, nothing herein contained shall be construed to allow any justice of said city or county to hold a court in any other township than the one for which he shall have been elected. *Stat.* 1867–1868, 551.

SEC. 6. Nothing in this act [preceding section] shall be construed to preclude the bringing of an action in justices' courts of this state against any party or parties residing out of the state. *Stats.* 1867–8, 552.

SEC. 7. The principal place of business of a corporation is its residence, within the meaning of that term as used in section twenty of the practice act, fixing the place of trial. Corporations have a local existence, like persons, and are properly included within the terms, citizens, inhabitants, residents and the like. 22 *Cal.* 537, 538.

SEC. 8. Whenever the fact of non-residence of both parties appears, the justice must dismiss the action. *E. D. Smith*, N. Y. 244.

SEC. 9. Judgment upon confession may be entered up in any justice's court in the state specified in the confession. [See JUDGMENT AND CONFESSION.] *Gen. Laws*, 5467.

SEC. 10. Justices' courts shall have jurisdiction of an action upon the voluntary appearance of the parties without summons, without regard to their residences or the place where the cause of action arose or the subject-matter of the action may exist. *Gen. Laws*, 5468.

SEC. 11. A party may come in voluntarily, and the record must then show that he appeared in court. If records or papers are lost their contents may be proved. 8 *Cal.* 569.

SEC. 12. In the case of *Lowe* vs. *Alexander* (15 Cal. 296) the question of jurisdiction was discussed, and it was decided, by way of distinction as a matter of evidence touching the subject of jurisdiction, "that power and authority to act shall be intended as to courts of general jurisdiction, but as to inferior courts or courts of limited jurisdiction,

those who claim any right or exemption under their proceedings are bound to show affirmatively that they had jurisdiction." Hence the necessity for great particularity in complying with the demands of the statute, that "no person shall be held to answer to any summons issued against him from a justice's court, in a civil action, in any township or city other than the one in which he shall reside, except in cases enumerated in the statute, and that a judgment rendered by a justice may be entitled to respect as such the record itself must show facts establishing jurisdiction." In other words, the record must show that the suit was brought in the proper township, and the question will not be inquired into as to whether the suit was brought in the proper township or whether the defendant waived all objections and appeared, or appearing objected, but the facts establishing jurisdiction must sufficiently appear upon the face of the record.

Right of Trial by Jury.

SEC. 13. The constitution provides: "The right of trial by jury shall be secured to all and remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law." *Constitution*, Art. 1, Sec. 3; *Gen. Laws*, 87.

SEC. 14. In all cases at law the parties have a right to demand and enforce a trial by jury. 5 *Cal.* 294.

SEC. 15. The language of the constitution is explicit; and it is evident that the framers of that instrument intended to give the benefit of the trial by jury in every case. The mere silence of an attorney cannot amount to a waiver of a constitutional right. The waiver must appear affirmatively and in the manner prescribed by law, and not by implication. A right which the law declares in positive terms to be waived cannot be restored by the action of any judicial tribunal. 2 *Cal.* 90.

When a Jury shall be Deemed Waived.

SEC. 16. A trial by jury shall be demanded at the time of joining issue; and shall be deemed waived if neither party then demand it. When demanded, the trial of the case

shall be adjourned until a time and place fixed for the return of the jury. If neither party desire an adjournment, the time and place shall be determined by the justice and shall be on the same day or within the next two days. *Gen. Laws*, 5518.

SEC. 17. Where, after both parties have avowed themselves ready, the justice tells the plaintiff to go on, and the defendant admits a part of plaintiff's account and a witness for the plaintiff is partly sworn, it is too late for the defendant to demand a *venire*. 1 *Cow.* 235.

Writ of Venire.

SEC. 18. A justice cannot issue a venire before the appearance of the defendant; but if a jury has been summoned and the defendant do not appear, the jury may be dismissed and the cause tried by the justice. 2 *South.* 501.

Juries (Except in the Counties of Plumas, Humboldt, Klamath, Del Norte, Butte, Siskiyou, Nevada, El Dorado, Tehama, Colusa, Tulare, Sutter, Trinity, Sierra, Lassen and Kern).

SEC. 19. In any civil or criminal action pending before any justice of the peace in this state, triable by jury, either party to the action before the commencement of the trial may demand a jury therein. When such demand shall be made it shall be the duty of such justice to fairly and impartially write the names of twenty-four persons on a slip of paper, residents of the township, each competent and qualfied as provided in sections first and second of this act. From said list the defendant, his agent or attorney, shall strike off one name, then the plaintiff, his agent or attorney, shall strike off one name, and so on, alternately, until but twelve names remain on said list. The twelve names left on said list shall be summoned as the jury in said action: *provided*, that in a civil action the parties may agree upon any number of jurors less than twelve, but not under three, and in such case the alternate striking off shall continue as aforesaid until the agreed number shall be left remaining, which shall be summoned. If either party refuse or neglect to strike off the names as aforesaid, the justice shall strike off the same in behalf of such refusing party. When a jury

is chosen the justice may continue the action to such time as the parties may agree upon, or to such convenient time as to allow the officer to summon said jurors. Neither party in a civil action shall be entitled to a jury in a justice's court when the defendant does not dispute the plaintiff's cause of action, and when the plaintiff does not dispute the defendant's defense, offset or counter claim. When a jury shall be chosen as provided in this section, the justice of the peace shall immediately issue a writ of venire, directed to the constable or sheriff to summon said chosen jurors to be and appear before such justice at the time and place in said writ mentioned. Said writ shall be substantially as follows:

State of . ....,
County of ....., township of .....,} ss.

Before ...., justice of the peace. To the sheriff or constable of said county, greeting:

You are hereby commanded to summon [here insert the names of jurors chosen] to be and appear at my office in said township ...., at ...., on the .... day of ...., A.D. 18.., to act as jurors in a civil (or criminal) action, wherein .... is plaintiff and .... is defendant; and of this writ make legal service and due return.

Dated .... day of ...., A.D. 18..

....,
Justice of the peace.

It shall be the duty of the constable or the sheriff upon receiving the writ of venire mentioned in the last section, to forthwith proceed and faithfully summon each of said jurors personally, and he shall without delay return to the justice said writ, with his indorsement thereon, specifying the persons summoned.

Jurors in Plumas, Humboldt, Klamath, Del Norte, Butte, Siskiyou, Nevada, El Dorado, Tehama, Colusa, Tulare, Sutter, Trinity, Sierra, and Lassen Counties.

SEC. 20. A trial jury shall be summoned for a justice's court from the citizens of its township who are qualified to act as jurors whenever specially ordered by the court: *provided*, that in civil actions the parties may agree upon any number of jurors less than twelve, but not under three. The jurors for a justice's court shall be summoned by its constable. The officer shall return to the court a list of

the names of the persons summoned, with his certificate of the names of services. The list shall be called over at the appointed time for the trial. If a sufficient number of competent and indifferent jurors do not attend, or if any of them shall be excluded, exempted or excused from any cause, the justice shall direct the constable to summon others from the vicinity, but not from the bystanders, sufficient to complete the jury. The justice before whose court jurors are summoned may impose a fine not exceeding fifty dollars for the neglect of a juror without reasonable cause to attend. The officer before whom a jury of inquest is summoned may impose a fine upon a juror for non-attendance, in the same manner and subject to the same conditions as jurors may be fined for non-attendance in a justice's court. If a sufficient number of competent and indifferent jurors do not attend, the justice shall direct others to be summoned from the vicinity, and not from the bystanders, sufficient to complete the jury. *Gen. Laws*, 5520.

SEC. 21. At the time appointed for the trial the justice shall proceed to call, from the jurors summoned, the names of the persons to constitute the jury for the trial of the isue. The jury, by consent of the parties, may consist of any number not more than twelve nor less than three. *Gen. Laws*, 5519.

SEC. 22. When a case in a district court was called for trial the plaintiffs were not present, and thereupon the defendants, who had pleaded a set-off to the demand in suit, consented that the trial be conducted with four jurors only. That number was accordingly impaneled, the trial proceeded with and a verdict obtained in their favor for two hundred dollars. A motion to set aside the verdict and for a new trial, based on the ground that the trial was had with only four jurors, was made and overruled; and from the order overruling the motion and from the judgment on the verdict an appeal was taken. The supreme court say: "The constitution of the state declares that 'the right of trial by jury shall be secured to all and remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.' *Art.* 1 *Sec.* 3. The one hundred and seventy-ninth section of the prac-

tice act prescribes the manner in which a jury may be waived, and among other modes, by the parties failing to appear for trial. The one hundred and fifty-ninth section of the same act fixes the number of persons who shall constitute a trial jury at twelve, unless the parties consent to a less number, and provides that they may consent to any number not less than three. These provisions determine the question raised by the plaintiffs. Their failure to appear at the trial operated as a consent on their part that the issue should be tried by the court without a jury. The defendants could have made this consent mutual by submitting the case to the court, but as they did not choose to take that course and called for a jury they were bound to take the number required by law. Twelve is that number, and a less number will not constitute a legal jury without the consent of the adverse party. Such consent must be express and entered at the time in the minutes of the clerk. It cannot be inferred from the mere absence of the adverse party. Such absence is a consent under the statute to a trial by the court, but nothing further. A party might well give such a consent who would object if a jury were to be called to take a less number of jurors than twelve." 18 *Cal.* 410, 411.

Qualification of.

SEC. 23. The following are the qualifications prescribed by statute to render a person competent to act as juror. A person shall be competent and qualified to act as grand or trial juror, except in the counties of Plumas, Humboldt, Klamath, Del Norte, Butte, Siskiyou, Nevada, El Dorado, Tehama, Colusa, Tulare, Sutter, Trinity, Sierra and Lassen, if he be:

1st. A citizen of the United States, a qualified elector of the county and a resident of the township at least three months before being selected and returned.

2d. In possession of his natural faculties.

3d. Who has sufficient knowledge of the language in which the proceedings of the courts are had: *provided*, that the requirements of this third subdivision of section twenty-three shall not apply to the counties of Monterey, San

Luis Obispo, Santa Barbara, Los Angeles, San Bernardino and San Diego.

4th. Assessed on the last assessment-roll of his township or county on real or personal property or both, belonging to him, if a resident at the time of the assessment.

A person shall be competent and qualified to act as grand or trial juror in the counties of Plumas, Humboldt, Klamath, Del Norte, Butte, Siskiyou, Nevada, El Dorado, Tehama, Colusa, Tulare, Sutter, Trinity, Sierra and Lassen, if he be:

1st. A citizen of the United States, a qualified elector of the county and a resident of the township at least three months before being selected and returned.

2d. In possession of his natural faculties and have sufficient knowledge of the language in which the court is held.

A person shall be incompetent and disqualified from acting or serving as a grand or trial juror if he be:

1st. A person not possessing the qualifications of section twenty-three of this act.

2d. A person convicted of a felony or misdemeanor involving moral turpitude.

3d. A professional gambler, following gambling for a business.

A person shall be exempt from liability to act as grand or trial juror, and shall not be selected if he be:

1st. A judicial, civil or military, officer of the United States or of the state of California.

2d. A person holding a county office.

3d. An attorney and counselor at law.

4th. A minister of the gospel or a priest of any denomination.

5th. A teacher in a college, academy or school.

6th. A practicing physician.

7th. An officer, keeper or attendant, of an alms-house, hospital, asylum or other charitable institution, in this state.

8th. Any person engaged in the performance of duty as officer or attendant of a county jail or the state prison.

9th. A captain, master or other officer, or any person employed on board of a steamer, vessel or boat, navigating the waters of this state.

10th. An express agent, mail carrier, telegraph operator or keeper of a public ferry or toll-gate.

11th. A person otherwise exempt by law. *Gen. Laws*, 3870–3872, 3907–3909.

SEC. 24. According to the statute, a person shall not be competent as a juror unless "an elector of the county in which he is returned." To be an elector of a county, a person must be a resident within it for thirty days. The objection to a person not such resident—as a juror—is good, and no peremptory challenge is necessary. 3 *Cal.* 107, 108.

SEC. 25. The statute requires the juror to be an elector of the county for which he is summoned, and he cannot be an elector unless he is a resident. Residence depends upon intention as well as fact, and mere inhabitancy for a short period against the intention of acquiring a domicil would not make a resident within the meaning of the law, so as to constitute an elector. 4 *Cal.* 175, 176.

Peremptory Challenge.

SEC. 26. Either party may challenge the jurors; but when there are several parties on either side, they shall join in a challenge before it can be made. The challenges shall be to individual jurors, and shall either be peremptory or for cause. Each party shall be entitled to four peremptory challenges. *Pr. Act.* 161.

SEC. 27. A justice has no right of his own mere motion, without any exception being taken by either party, to challenge the panel of jurors and issue a new *venire*. 15 *Johns.* 169.

Challenge for Cause.

SEC. 28. The following are grounds of challenge:

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2d. Consanguinity or affinity within the third degree to either party.

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in the business with either party, or being security on any bond or obligation for either party.

4th. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

5th. Interest on the part of the juror in the event of the action or in the main question involved in the action, except the interest of the juror as a member or citizen of a municipal corporation.

6th. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7th. The existence of a state of mind in the juror evincing enmity against or bias to either party. *Pr. Act*, 162.

SEC. 29. Generally in impaneling a jury each party has a right to put questions to a juror to show not only that there exists proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge. *Watson* vs. *Whitney*, 23 Cal. 375.

SEC. 30. Challenges for cause shall be tried by the justice in a summary manner, who may examine the juror challenged and witness. *Gen. Laws*, 5521.

Duty and Power of Jury.

SEC. 31. After hearing the charge, the jury may either decide in court or retire for deliberation. Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them; but none taken by any other person. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of or after notice to the parties or counsel. *Gen. Laws*, 5106, 5108.

Province of Justice and Jury in the Trial of Civil Cases.

SEC. 32. It is not the province of a judge where a jury tries the case to pronounce upon the facts. 4 *Cal.* 201; 23 *Cal.* 482; 14 *Cal.* 418.

SEC. 33. It is error for the court to submit to a jury the question of the legal effect of written documents offered in evidence during the trial. 24 *Cal.* 269.

SEC. 34. Juries are used as instruments to determine facts unknown to the courts; but a court does not require the verdict of a jury to inform it of facts accruing in the presence of the court itself. 9 *Cal.* 21.

SEC. 35. The credibility of any and all statements of a witness is a matter for the jury, and the court should not interfere with their province in this respect. It does not follow because a witness who is impeached, or even if not impeached is supported in some degree or in some portions of his evidence by other witnesses, that the jury is bound, as a matter of law, to believe everything the witness says. Many things may characterize a cause or the testimony of a witness which deny or impair credit to his assertions; and the jury should be left free to pass upon all the circumstances and considerations in connection with his testimony and assign to such statements their true weight and value as proof. A witness may be supported in a particular part of his testimony, and thus supported the jury may believe that part, while in other respects they may think him altogether incredible. 16 *Cal.* 113; 21 *Cal.* 266.

SEC. 36. If the jury find a verdict of damages for the defendant in a case in which he is not entitled to damages, the justice may enter a *remittitur damna*, and give judgment for the defendant generally. 4 *Johns.* 414.

SEC. 37. In general, the jury possess the right to alter their verdict and the parties a right to poll them at any time previous to its record. But it is doubtful whether a jury, after agreeing upon a sealed verdict and separating, can change it, except in mere matters of form. The opportunities of tampering with juries after separation are so numerous, and in important cases the temptation so great and the ability of detection so slight, as to make it a matter

of grave doubt whether sound policy does not require an adherence to the verdict as sealed, even as against a subsequent dissent of one or more of the jurors. 12 *Cal.* 494.

SEC. 38. The affidavits of jurors will not be allowed to contradict their verdict. 5 *Cal.* 42.

SEC. 39. A juror cannot be allowed to impeach his own verdict. 4 *Cal.* 103.

Polling the Jury.

SEC. 40. The only question presented for consideration is whether a party has the right in a civil action to poll the jury after their verdict is recorded. In criminal cases the statute provides that after the verdict is rendered and before it is recorded, the jury may be polled on the requirement of either party. In civil cases the statute as to polling the jury is silent. In some states a poll may be had in civil cases upon the demand of either party before the verdict is recorded; in other states the proceeding is allowed only under special circumstances. The authorities show that the proceeding is not necessarily an incident of the trial, which a party may at his option insist upon, but on the contrary, that it is a matter resting entirely in the discretion of the court—but a proceeding which the court will generally allow when there are circumstances of suspicion attending the delivery of the verdict. Thus, in *Landes* vs. *Dayton* (Wright's Rep. 659), the supreme court of Ohio said: "We do not recognize any right in a party in a civil case to poll a jury—though we sometimes allow it if the verdict is delivered under circumstances of suspicion. It is, we think, mere matter of practice for each court to regulate for itself. It is perfectly respectful for counsel to ask leave to have a jury polled and it is no disrespect in the court to refuse." Though the proceeding in civil cases may be allowed in the discretion of the court before the verdict is recorded, it is never allowed afterwards. *Blackley* vs. *Sheldon*, 7 Johns. 33; *Walters* vs. *Junkins*, 16 Searg. and Rawle, 414; and *Graham on New Trials*, Waterman's edition, 1406. With the assent of the jury to the verdict as recorded, their functions with respect to the case cease, and the trial is closed. In the present case the record was made before the verdict was announced. This was irregu-

lar; the verdict should in all cases be either declared by the foreman of the jury, or if sealed read by the clerk, so that the parties may be distinctly informed of its purport. No objection, however, was taken to the course pursued. The appellant would seem to have acted upon the supposition that either party had the right to claim a poll at any time before the jury was discharged. In this respect, as we have shown, he was mistaken. See *Martin* vs. *Maverick*, 1 McCord, 27; *Ropps* vs. *Barker*, 4 Pick. 238; also, *Fellows' case*, 5 Greenl. 333; *Commonwealth* vs. *Roby*, 12 Pick. 513; and *State* vs. *Allen*, 1 McCord, 525. There is nothing in the objection that the assent to the verdict was expressed by the foreman and not by the jurors themselves. The jurors, acting as a body, speak through their foreman. They declare by his voice their verdict, and their assent to the same as recorded. His assent is conclusive upon all, unless a disagreement to the record be expressed at the time. 20 *Cal.* 70–72.

CHAPTER XC.

TROVER AND CONVERSION.

SECTION 1. Trover is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. 2 *Cal.* 572.

SEC. 2. The refusal to deliver goods on demand will not in all cases constitute a conversion, unless the party refusing have it in his power to deliver up the goods detained. 2 *Cal.* 572.

SEC. 3. A bailee is not liable in trover where the goods have been lost or stolen, for there is no actual conversion. Trover is a remedy to recover the value of personal chattels, wrongfully converted by another to his own use. 5 *Cal.* 572.

SEC. 4. Where one is intrusted by another with goods with power to sell the same as the agent or clerk of the owner, a mere intention on his part to appropriate the proceeds to his own use, does not amount to a conversion of the goods; but while his agency continues his sales in pur-

suance of his authority are valid and bind the owner. If one is intrusted with goods by the owner with power to sell the same at retail for the owner as his agent or clerk, and if he then sells the goods in payment of his private debt to one who has full knowledge of the owner's title and the agent's relation to the goods, the purchase made with this knowledge amounts to a conversion of the goods by the purchaser. 25 *Cal.* 556.

SEC. 5. The action of trover might be brought when the plaintiff's goods had been converted, and conversion is always implied where one had secured goods in any manner and without right to detain them, refused to deliver them upon request. 2 *Cal.* 571; 4 *Cal.* 184; 8 *Cal.* 514; 10 *Cal.* 392.

CHAPTER XCI.

TRUSTS.

SECTION 1. The radical idea of a trust is confidence. *Butler's Co. Litt.* 249, lib. 3. A trust, then, in its simplest elements is a confidence reposed in one person who is termed the trustee, for the benefit of another who is termed *cestui qui trust*, and it is a confidence respecting property, which is thus held by the former for the benefit of the latter. Every grant or assignment of any existing trust in land, goods or things, in action, unless the same shall be in writing, subscribed by the person making the same or by his agent lawfully authorized, shall be void. *Gen. Laws*, 3165.

SEC. 2. If property, in its original state and form, is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it or those who represent him in right (not being *bona fide* purchasers for a valuable consideration without notice), any more valid claim in respect to it than they respectively had before such a change. An abuse of a trust can confer no rights on the party abusing it or on those who claim in privity with him. This principle is fully recognized at law in all cases where it is sus-

ceptible of being brought out as a ground of action, or of defense, in a suit at law. It matters not in the slightest degree into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes or of goods or of stock, for the product of a substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such. The right ceases only when the means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description. 13 *Cal.* 140, 141.

SEC. 3. One who is a trustee or who stands in a situation of trust and confidence, cannot purchase or deal with the subject of the trust, neither can he purchase debts due to be paid out of the trust estate nor place himself in an attitude antagonistic to the trust. 6 *Cal.* 245.

CHAPTER XCII.

UNDERTAKING ON BONDS.

	SECS.		SECS.
GENERALLY	1–2	ALTERATIONS AND ERASURES	10
CONSIDERATION	3–4	ADMINISTRATOR'S BOND	11
WHAT IS JOINT AND SEVERAL	5–6	INJUNCTION BONDS	12–13
LIABILITY OF SURETIES	7–9		

Generally.

SECTION 1. Taking all of our statutes together, the obvious design was to put an undertaking on the same footing as a bond. 13 *Cal.* 608.

SEC. 2. If a party choose to execute a bond rather than pay money over to an officer which he could otherwise be compelled to do, it is a voluntary act upon his part and the bond is good as a common law bond. He is to be considered as a party who, for a personal accommodation, has assumed a legal responsibility, and after receiving its benefits on his part should be estopped from denying its legality. 7 *Cal.* 553, 554.

Consideration.

SEC. 3. A bond being under sale, imports a consideration, if there be nothing in its terms which negatives this conclusion. 17 *Cal.* 622.

SEC. 4. The mere fact of a receiver holding moneys in trust for parties, paying a portion as an advance to a party whom he believes or supposes will be entitled to it, is not such an illegal consideration as to vitiate a bond for its repayment. 12 *Cal.* 289.

What is Joint and Several.

SEC. 5. A bond running thus: "For which sums respectively, unto the said state of California in the manner and in the proportions hereinbefore set forth, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents," is a joint and several bond. 25 *Cal.* 521.

SEC. 6. The absence of the signature of the principal obligor to an official bond is not a defect which may be cured by its suggestion in a complaint under the eleventh section of the act concerning official bonds. 21 *Cal.* 585.

Liabilities of Sureties.

SEC. 7. The sureties on an undertaking cannot be held to do more than their principal was required to do. 7 *Cal.* 572.

SEC. 8. The defendant Dunlap was elected recorder of the city of Sacramento for one year from April 10th, 1857, and by an ordinance of the city was required before entering upon the discharge of his official duties to give a bond with two or more sureties for their faithful performance. The instrument upon which this suit was brought was filed and approved as such bond. It purports to be the bond of Dunlap as principal, and of Gass and Tucker as sureties, but is only signed by the sureties. It bears neither the signature nor seal of Dunlap, and the question for determination is whether the intended principal or the sureties are bound by it. We are clearly of the opinion that they are not. As Dunlap has never put his signature to it the in-

strument is not his deed. If liable for the fees alleged to have been collected and to belong to the plaintiffs, it must be on grounds independent of the supposed bond, and as any one is liable for moneys received which are the property of others. The liability of the sureties is conditional to that of the principal. They are bound if he is bound and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of the three. Some one must have written his signature first, but it is to be presumed upon the understanding that the others named as obligors would add theirs. Not having done so it was incomplete and without binding obligation upon either. [*Bean* vs. *Parker et. al.* 17 Mass.; 591; *Wood* vs. *Washburn*, 2 Pick. 24; *Sharp* vs. *United States*, 4 Watts, 21: *Fletcher* vs. *Austin*, 11 Vert. 447; *Johnson* vs. *Erskine*, 9 Texas, 1.] 14 *Cal.* 422.

SEC. 9. A bond which in form is the joint obligation of a principal and his sureties and not joint and several, and signed by the sureties but not by the principal, is invalid and not binding on the sureties. 21 *Cal.* 585.

Alterations and Erasures.

SEC. 10. No alteration or erasure will defeat the recovery upon a bond unless it materially affects the rights or condition of the obligor, or is the result of a fraudulent intent to effect the same object. Thus, a bond was made to the sheriff instead of the party to be protected by it by mistake; after the mistake was discovered the name of the sheriff was erased and that of the party inserted: *Held*, that this did not invalidate the bond. 2 *Cal.* 523.

Administrator's Bond.

SEC. 11. An action against an administrator on his bond for the faithful execution of his duties as an administrator, is an action against him personally, and may be within the jurisdiction of a justice's court. 1 *E. D. Smith* (N. Y.) 404.

Injunction Bonds.

SEC. 12. In an action upon an injunction bond to re-

cover damages for the wrongful issuing of the writ, the amount paid to counsel as a fee to procure the dissolution of the injunction may be allowed as part of the damages; for the necessity of paying such counsel fees is an actual damage that the defendant has sustained in defending himself and procuring a dissolution of the injunction, and the condition of the bond is imperative that the "obligators shall pay to the parties enjoined such damages as they may sustain by reason of the injunction. The principle is not only just in equity, but sound in law, that all the damages to which a party may be put by the wrongful issuance of an injunction, should be recoverable in an action upon such bond, and reasonable counsel fees should be included in those damages; of course, leaving the amount to be assessed by the jury (overruling 1 *Cal.* 412). Generally, the recovery of counsel fees is not allowed as a part of the damages, and the reason given for it is because the loss is consequential and not the actual and direct injury complained of; but where the injury complained of is the improper commencement and prosecution of a writ or of any process in a suit, the counsel fees is a loss as immediate and direct as any other, and should be allowed (overruling 1 *Cal.* 412). 3 *Cal.* 218, 219, 311.

SEC. 13. In an action on an injunction bond the fees of an attorney employed to resist the injunction, cannot be recovered as damages unless they have been paid. The fact that the plaintiff is subject to a liability to his attorney, without showing actual payment to him, is insufficient. 25 *Cal.* 169.

CHAPTER XCIII.

USE AND OCCUPATION.

SECTION 1. Where a contract has been made, either by express or implied agreement, for the use of a house or other real estate where there was no amount of rent fixed and ascertained, the landlord can recover a reasonable rent

in an action of assumpsit for use and occupation. *Bouv. Dict.* 594.

SEC. 2. A defendant who entered under a bond for a deed from the plaintiff, cannot set off his improvements against the damages for use and occupation. *Kilburn* vs. *Richie*, 2 Cal. 145.

SEC. 3. The right to recover for use and occupation is founded alone on contract. *O'Conner* vs. *Corbett*, 3 Cal. 370.

SEC. 4. No action for use and occupation will lie where possession is adverse and tortuous, for such possession excludes the idea of a contract, which in all cases of this action must be either expressed or implied. *Sampson* vs. *Shaeffer*, 3 Cal. 196.

CHAPTER XCIV.

VALUE.

SECTION 1. Value in common law has two different meanings; it sometimes expresses the utility of an object, and sometimes the power of purchasing other goods with it. The first may be called value in use, the latter value in exchange. Value differs from price. The latter is applied to live cattle and animals; in a declaration, therefore, for taking cattle they ought to be said to be of such a price; and in a declaration for taking dead chattels or those which never had life, it ought to lay them to be of such value. *Bouv. Dict.* 598.

SEC. 2. The universal standard of value is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as other lands. *State of California* vs. *Moore*, 12 Cal. 56.

SEC. 3. Of property at given time, in the absence of a contrary showing, the value of the property at said time will be presumed to be what it was then worth in the market. The rental of property is not an unerring criterion of its value, even in case the title be perfect, and it is less certain if the title be doubtful. It may be considered for the

purpose of ascertaining the value of the property rented, but should not outweigh other and direct evidence to the same point. *Kisling* vs. *Shaw*, 33 Cal. 425.

CHAPTER XCV.

VARIANCE.

SECTION 1. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. *Pr. Act*, 71.

SEC. 2. A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby. *Pr. Act*, 579.

SEC. 3. *Allegata and Probata must Correspond.*—The rule that the allegata and probata must correspond is not abrogated by the civil practice act. The plaintiff must prove his contract as alleged in his complaint or he is not entitled to recover. 28 *Cal.* 65; 25 *Cal.* 460; 32 *Cal.* 82.

SEC. 4. *A Pleader averring a Written Sale may prove a Verbal one.*—The party making an allegation in a pleading that the sale of a mining claim under which he claims title was in writing is not thereby precluded from proving that the sale was a verbal one. 30 *Cal.* 360.

SEC. 5. *On Bill of Exchange.*—If the answer set up as a defense in an action on a bill of exchange is a total failure of consideration, and the proof shows a partial failure only, the variance is not an available one under our practice. 31 *Cal.* 383.

SEC. 6. A judgment will not be reversed on the ground of variance between the pleadings and proofs when the variance does not mislead the appellant to his prejudice. 32 *Cal.* 11.

SEC. 7. The seventy-first section of the practice act,

requiring immaterial variance between the pleadings and proofs to be disregarded, is a most beneficial provision, and should be literally construed and carried out. 32 *Cal.* 11.

CHAPTER XCVI.

WARRANTY.

	SECS.		SECS.
IN GENERAL	1-5	RULES	6-7

SECTION 1. No particular form of words is necessary to constitute a valid warranty. Any positive affirmation respecting the thing to be sold which the purchaser may rely on as a fact, and not the expression of an opinion, is sufficient. The following is a warranty: "This horse is sound and free from vice; he is not afflicted with lameness or any disease; I would not be afraid to warrant him." Either of these affirmations is a warranty. 13 *Wend.* 277; 19 *Johns.* 290. If, however, the seller says, "This horse is sound as far as I know," it is merely an expression of opinion, and he will not be considered as warranting the horse. If, however, it can be shown he did know otherwise, the purchaser may repudiate the sale on the ground of fraud. *Story on Con.* 529. The affirmation may be made at any time while the treaty for the sale is going on, although the sale may not take place for some days. 11 *Wend.* 584.

SEC. 2. A general warranty relates to the general character of the thing warranted; as, that a horse is free from disease, or free from vice. If, however, the animal has a defect which is pointed out to the purchaser, the warranty, though in writing, will not extend to it. Of whatever defect the purchaser is informed he cannot afterwards complain.

SEC. 3. Where there is willful misrepresentation, concealment or fraud, by the vendor, either as to the kind, soundness, quality or other particular, of the article sold, the vendee may disregard the warranty and either return the article and recover the price paid or bring his action

for his damages for the fraud; and he may show the fraud by parol evidence, even though the contract be in writing, if it is silent as to the fraudulent inducements. 3 *Barn. & Cress.* 623.

SEC. 4. A mere expression of an opinion in relation to the quality or worth of an article, does not amount to a warranty. Every person in making a purchase reposes at his peril in the opinion of others, where he has an equal opportunity with them of judging; and where he sees the article he must judge for himself. The rule of *caveat emptor* applies in such case. 1 *Sid.* 146. When a sale is made by a sample, in order to raise an implied warranty that the bulk of the article is like the sample, it is necessary to show by the circumstances of the case that the sale was intended by the parties to be by the sample. If the purchaser might have examined the bulk, but did not, simply from inconvenience in so doing, the rule *caveat emptor* applies.

SEC. 5. Where an article has been sold with warranty, whether express or implied, upon its breach an action for damages may be brought without offering to return the article or giving notice of the defect; and the purchaser may recover his damages although he sells the article. 12 *Wend.* 566; 18, 425. The measure of damages is the difference between the actual value and what its value would have been had it been conformable to the warranty, for I may have purchased a cow for thirty dollars under a warranty that she is gentle and harmless. The cow, however, if she were gentle and harmless is worth fifty dollars, but by reason of her wild and vicious disposition she is worth only thirty-five dollars. Here, notwithstanding the cow is worth more than I paid for her, it is clear that I have lost fifteen dollars, because she did not conform to the warranty; this, therefore, is the true measure of damages. 11 *John.* 50.

SEC. 6. Upon the subject of warranty generally the following rules may be laid down:

1st. In order to recover for the unsoundness or vice of an animal there must be shown an express warranty or a fraudulent concealment, or misrepresentation of the vendor.

2d. If there be a defect unknown to the vendor and there be no warranty he is not liable.

3d. If any deceit be practiced, either by concealment or misrepresentation, the purchaser may bring his action for damages or return the article. But if he elects to return it he must do so in a reasonable time.

4th. There may be a warranty and a fraud in the same sale. In such case the purchaser may return the article or bring his action for damages.

5th. There may be a warranty and an authority to return the article if it be not as warranted. In this case the purchaser may return it or rely upon his action for damages.

6th. Any organic defect is an unsoundness. 2 *Chit.* 425; 4 *Camp.* 281; 1 *Stark.* 127.

SEC. 7. The following cases adjudicated in this state may be referred to upon the law of warranty: 5 *Cal.* 262, 471; 9 *Cal.* 226; 14 *Cal.* 470; 24 *Cal.* 458.

CHAPTER XCVII.

WATER RIGHTS.

	SECS.		SECS.
PREFERRED USES OF WATER	1– 4	RIGHT TO USE OF WATER IN PUBLIC MINERAL LANDS	27
NATURE OF RIGHTS TO WATER	5– 7	TEST OF PRIORITY IN CLAIMS TO WATER	28–29
RIGHTS TO WATER BY RIPARIAN OWNERSHIP	8– 9	MINGLING OF WATERS BY DIFFERENT APPROPRIATORS	30–31
WHAT IS AN APPROPRIATION OF WATER	10–11	ACTIONS FOR WRONGFUL DIVISION OF WATER	32–33
RIGHTS OF APPROPRIATION OF WATER	12–26	INJURIES BY WATER	34–39

Preferred Uses of Water.

SECTION 1. The uses to which water may be appropriated are: To supply natural wants, such as to quench thirst, to water cattle, for household or culinary purposes, and in some countries for the purposes of irrigation. These must be first supplied before the water can be applied to the satisfaction of artificial wants, such as mills, manufactories and

the like, which are not indispensable to man's existence. 8 *Cal.* 141.

SEC. 2. The use of water for domestic purposes and for the watering of stock are preferred uses, because essential to sustain life. Other uses must be subordinate to these. In such cases the element is entirely consumed. Next to these may properly be placed the use of water for irrigation in dry and arid countries. In such cases the element is also entirely consumed. Under a proper system of irrigation only so much water is taken from the stream as may be needed, and the whole is absorbed or evaporated. Entire absorption is the contemplated result of irrigation. When properly used as a motive power for propelling machinery, the element is not injured, because the slight evaporation occasioned by the use is unavoidable, and is not esteemed by the law a substantial injury. Any number of riparian proprietors can use the water as a motive power in succession without substantial injury to any other, for the element is just as good for the purposes of the last as for those of the first proprietor. 8 *Cal.* 333.

SEC. 3. Considering the different uses to which water is applied in countries governed by the common law, it is not so difficult to understand the principles that regulate the relative rights of the different riparian proprietors. As to the preferred uses, each proprietor had the right to consume what was necessary, and after doing this he was bound to let the remaining portion flow without material interruption or deterioration in the natural channel of the stream to others below him. If the volume of water was not sufficient for all then those highest up the stream were supplied in preference to those below. So far as the preferred uses were concerned no one was allowed to deteriorate the quality of the water; and for the purpose of a motive power there was no use of the element that could impair its quality. 8 *Cal.* 333.

SEC. 4. In a mineral region we have a novel use of water that cannot be classed with the preferred uses, but still a use that deteriorates the quality of the element itself when wanted a second time for the same purposes. In cases heretofore known, either the element was entirely consumed

or else its use did not impair its quality when wanted again for the same purpose. If the use of water for mining purposes did not deteriorate the quality of the element itself, then the only injury that could be complained of would be the diminution in the quantity and the interruption in the flow. 8 *Cal.* 333.

Nature of Rights to Water.

SEC. 5. The right of property in water is usufructuary and consists not so much in the fluid itself as in the advantage of its use. The owner of land through which a stream flows, merely transmits the water over its surface, having the right to its reasonable use during its passage. The right is not in the *corpus* of the water and only continues with its possession. A party cannot reclaim water that he has lost. 3 *Cal.* 252; 8 *Cal.* 141.

SEC. 6. It is true that the mere right to water is a sort of incorporeal thing; but the water itself is substantial and tangible, and as the right gives the control and possession of this commodity, and entitles the party to damages for its diversion by another, there is no reason why this right may not be acquired by two or more acting together, or why, when they do acquire it, they do not hold it as other property and may not sue as such for any unlawful interference with it. 12 *Cal.* 47; 13 *Cal.* 232.

SEC. 7. The location of land carries with it all the incidents belonging to the soil. Those who construct water ditches will do so with reference to the appropriations of the public domain that have been previously made and the rights that have been already acquired, with a full knowledge of their own rights as against subsequent locators. 8 *Cal.* 144.

Rights to Water by Riparian Ownership.

SEC. 8. By the common law, the proprietor of lands upon the banks of a water-course owns to the middle of the stream, and the proprietor of the lands through which the stream flows is held to be the owner of the bed of the stream and entitled to the use of the water which flows over his land. 8 *Cal.* 141.

SEC. 9. The property in the water, by reason of riparian

ownership, is in the nature of a usufruct, and consists in general not so much in the fluid as in the advantage of its impetus. This, however, must depend in a great measure upon the natural as well as the artificial wants of each particular country. The rule is well settled that water flows in its natural channels and should be permitted thus to flow, so that all through whose lands it passes may enjoy the privilege of using it. A riparian proprietor, while he has the undoubted right to use the water flowing over his land, must so use it as to do the least possible harm to other riparian proprietors. 8 *Cal.* 141; 5 *Cal.* 145.

What is an Appropriation of Water.

SEC. 10. In appropriating unclaimed water on the public lands, only such acts are necessary and such indications and evidences of appropriation required as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable—surveys, notices, stakes and blazing of trees, followed by work and actual labor, without abandonment, will in every case, where the work is completed, give title to the water over subsequent claimants. The title to the water conveyed through a ditch constructed in such manner will, on completion of the work, date back from the beginning of the work as against subsequent appropriators. 12 *Cal.* 28.

SEC. 11. In determining the question of diligence in the construction of such a work, the jury have a right to take into consideration the circumstances surrounding the parties at the date of the appropriation, such as the nature and climate of the country traversed by such ditch, together with the difficulties of procuring labor and materials. 12 *Cal.* 28; 15 *Cal.* 271; 21 *Cal.* 381.

Rights of Appropriation of Water.

SEC. 12. The appropriation of the water of a stream to apply it to some useful purpose secures a right which cannot be infringed by a subsequent appropriation by others. 21 *Cal.* 381.

SEC. 13. The prior right to the use of the natural water of a stream does not entitle the owner of such a right to

the exclusive use of the channel. So long as his right is not interfered with there is no reason why the bed of the stream may not be used by others as a channel for conducting water. 11 *Cal.* 151; 23 *Cal.* 490; 7 *Cal.* 325.

SEC. 14. Where parties have appropriated the prior right to the use of the water of a stream by the commencement and partial completion of a ditch and flume, they have the right to use so much of the waters of the stream as are necessary to preserve their flume from injury while in the process of construction. 10 *Cal.* 233; 8 *Cal.* 143.

SEC. 15. Where a party takes up a mill site on public agricultural land, erects a saw-mill, dwelling, etc., and appropriates the water of the stream for the use of the mill, he may use the water for a grist-mill erected at the same place years afterwards. It would require clear proof that the purposes of the water for the saw-mill had been fully answered, to hold that the title to the water was abandoned. 13 *Cal.* 221.

SEC. 16. *Action for Invasion of Water Right.*—Until a claimant is himself in a position to use the water, the right to the water does not exist in such a sense as to enable him to maintain an action against another, either to recover the water or damages for its diversion. 37 *Cal.* 282.

SEC. 17. *Distinct Causes of Action.*—An entry upon an ouster from a dam site and dam in process of construction and canal site and canal in process of construction, and a diversion of water claimed by means of the dam and canal, are two distinct causes of action, which cannot be united in the same statement of cause of action in a complaint, but should be separately stated. 37 *Cal.* 282.

SEC. 18. *Rights of Rival Corporations—Power of District Court.*—Where one of two rival water company corporations had acquired, by purchase and consent of the owner, certain lands and waters which are appropriated to the lawful purpose of its incorporation; and thereafter the other corporation, without showing an availing effort made by it in good faith to acquire the same property for a like purpose, instituted proceedings under said statute for its condemnation, as against the first corporation: *Held*, 1st, that said first corporation might properly resort to the equitable

jurisdiction of the district court to annul a condemnation ordered in said proceeding; 2d, that in such case a judgment of the district court annulling said proceeding was properly rendered. 36 *Cal.* 639.

SEC. 19. When a plaintiff claims water on the ground of prior appropriation, it is error in the court to refuse an injunction to this effect: "The plaintiff is not entitled to any greater quantity of the water of Desert Creek than he actually appropriated prior to defendants' appropriation." 36 *Cal.* 639.

SEC. 20. *Query.*—What would have been the rule if plaintiff had claimed by reason of occupancy of the land and as riparian proprietor? 36 *Cal.* 639.

SEC. 21. *Query.*—Whether defendant could derive any right by conveyance from an Indian? 36 *Cal.* 639.

SEC. 22. Plaintiff takes up land on a stream from which a part of the water has already been diverted by a ditch and dam. Subsequently defendant takes up the land on which the dam and ditch are situated. The plaintiff has no right to remove the dam. 36 *Cal.* 639.

SEC. 23. The right to the enjoyment and repair of a dam and to convey the water so diverted to flow through certain land, is such an interest in land as can only be conveyed by deed in writing. 3 *Nev. Rep.* 507.

SEC. 24. Where an action is brought to recover a water right and mill site described by metes and bounds, as land boundaries are usually described: *Held*, that an instruction to the effect "that the plaintiff in order to recover must prove that he was entitled to the premises and water, and that defendants damaged him by the diversion of the water," is erroneous. To entitle plaintiff to recover, it was only necessary to prove title and immediate right of possession in himself and the occupancy by defendant of the premises described when suit was brought. 2 *Nev. Rep.* 67.

SEC. 25. Where the right of the use of running water is based upon appropriation and not upon ownership in the soil, priority of appropriation gives the superior right. 4 *Nev. Rep.* 534.

SEC. 26. *Conflicting Water Claims.*—Where Rose in 1858

designed a large ditch to carry a certain quantity of water from Carson River, a distance of over four miles, to Dayton, and constructed a sufficiently large head, but after proceeding less than half a mile, reduced its size so that a small portion only of the quantity of water originally intended passed through it, and it was not enlarged to its originally intended dimensions until after 1862, and in 1869 the Ophir Silver Mining Company constructed a ditch tapping the river below the head of the Rose ditch, and on the enlargement of the Rose ditch the Ophir ditch was deprived of its supply: *Held*, that Rose had not prosecuted the work on his ditch as originally intended with reasonable diligence, and that he therefore was only entitled to the quantity of water which ran through his ditch in 1859 when the Ophir ditch was constructed. 4 *Nev. Rep.* 534.

Right to use of Water Course in Public Mineral Lands.

SEC. 7. Miners are in possession of the mineral lands under license from both the state and federal government. This being conceded, the superior proprietor must have had some leading object in view when granting this license, and that object must have been the working of these mineral lands to the best advantage. The intention was to distribute the bounty of the government among the great number of persons, so as most rapidly to develop the golden resources of this region; while at the same time the prior substantial rights of individuals should be preserved. In the working of these mines water is an essential element, therefore that system which will make the best of its use without violating the rights of individuals will be most in harmony with the end contemplated by the superior proprietor. In a late case it was held that the ditch proprietor was equally entitled to the exclusive use of the water, pure and undiminished, as well against the subsequent locator *above* as *below* the ditch, and that the two cases were not distinguishable in any essential particular. In that case a petition for a rehearing was filed and has not yet been disposed of. The question is still therefore an open one. But there is a distinction in the two cases. When a party constructs a ditch and diverts

the waters of a stream before the rights of others have attached below, he only takes it from one unoccupied mining locality to another. In such case there can, as a general rule, be no substantial injury done to the mining interest of the state or to the rights of individuals. The water is taken to a locality where it is used, and after so being used, it finds its way to other mining localities, where it is again used. The effect of the diversion is not to diminish the number of times the water may be used. In the majority of cases it is used as often, and upon the whole as profitably, as if it had never been diverted, but has continued to flow down its natural channels. The general usefulness of the element is not impaired by the diversion. It may be very safely assumed that as much good, if not more, is accomplished by the diversion as could have been obtained had such diversion never occurred. In fact, it may be presumed that the water is taken to richer mining localities, where it is more needed, and, therefore, the diversion of the stream promotes this leading interest of the state. The ditch owner is entitled to have the water flow, without material interruption, in its natural channel. This right would seem to be compatible in general with the right of the water above. He is entitled to the water so undiminished in quantity as to leave sufficient to fill his ditch as it existed at the time the locations were made above. This right is essential to the protection of the ditch owner. If the rule is laid down that the subsequent locators above may so use the water as to diminish the quantity, it would be difficult to set any practical limits to such diminution, and the ditch property might be rendered entirely worthless. As the water cannot be absorbed or evaporated at once, the ditch owner should be entitled to its exclusive use in such case. And as to the deterioration in quality, the injury should be considered as an injury without consequent damage. 8 *Cal.* 333, 334, 336; 23 *Cal.* 481; 25 *Cal.* 504.

Test to Priority in Claims to Water.

SEC. 28. Possession or actual appropriation is the test of priority in all claims to the use of water, where such

claims are dependent upon the ownership of the land through which the water flows. 12 *Cal.* 28.

SEC. 29. Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows. Such appropriation cannot be constructive, because there would be no rule to limit or control it, resting, as it must, only in intention. The design of parties, years before, to appropriate a certain creek as a connecting link of a series of water works, cannot give the exclusive rights until it is executed, because it is not the intention to possess, but the actual possession, which gives the right. The purchase by parties of a certain dam is an actual appropriation of the waters of the creek so far, but no further; and until they build a dam below, in order to make a further appropriation, any one else has the right to do so. If they have commenced first in good faith, then although their power of enjoyment will not commence until its completion, yet the right, as against others, will bear relation to the time of commencement. 6 *Cal.* 108; 7 *Cal.* 263; 8 *Cal.* 338.

Mingling of Waters by Different Appropriators.

SEC. 30. Where there is a confusion of goods willfully made by one owner without the consent of the other so that it becomes impossible to distinguish what belongs to each, the common law gives the entire property to the injured party. But this rule is carried no further than necessity requires; and if the goods can be easily distinguished and separated—as articles of furniture, for instance—then no change of property takes place. So, if the corn or flour mixed together were of equal value, then the injured party takes his given quantity and not the whole. 11 *Cal.* 151.

SEC. 31. So where water from an artificial ditch is turned into a natural water course and mingled with natural waters of the stream, for the purpose of conducting it to another point to be there used, it does not necessarily follow that the water introduced becomes subject to the use of the first appropriator of the natural waters of the stream because its identity is lost by being mingled with

the natural water flowing in the creek. The rights of the parties after such mingling are not unlike the rights of the owners of goods of equal value after their mixture—both are entitled to take their given quantity. 11 *Cal.* 151.

Actions for Wrongful Diversion of Water.

SEC. 32. The diversion of a water course is a private nuisance. 8 *Cal.* 397.

SEC. 33. A person appropriating and diverting the water of a stream at a given point cannot afterwards change the point of diversion to the prejudice of a subsequent locator. 15 *Cal.* 161, does not hold that the first appropriator has an absolute and unqualified right to change the point of diversion, and the doctrine of that case is affirmed. Where a party attempts to construct a dam on a creek for the purpose of diverting the water at that point, and such diversion is illegal as against another party who has a dam lower down, the latter may oust the former from the possession of the ground at that point and prevent the construction of the dam. 19 *Cal.* 609; 8 *Cal.* 443; 25 *Cal.* 504.

Injuries by Water.

SEC. 34. A party is responsible for injuries done the ditch of another by the deposit of mud and sediment in it. 11 *Cal.* 162.

SEC. 35. The owner of a dam is bound to see to his own property, and to so govern and control it that injury may not result to his neighbors. If, in consequence of gross neglect on the part of plaintiff the injury happened, a different rule might be applied, but a mere want of reasonable care to prevent the injury does not impair the right to recover. If a man carelessly fires a gun in the street it would not be admissible for him when sued for the injury done another by it to say that, by reasonable care, the other might have got out of the way. 10 *Cal.* 541; 12 *Cal.* 358; 23 *Cal.* 225.

SEC. 36. The fact that plaintiff could have prevented damage by pulling off a board from defendant's flume and permitting the water to discharge above plaintiff's claim, is no defense, because they were not obliged to avoid the in-

juries complained of by committing a trespass. 15 *Cal.* 319.

SEC. 37. When, by means of an artificial ditch, the waters of a stream are conducted from the bed of the stream over the adjacent country, crossing other small natural water-courses, the beds of which are dammed up by the embankment of the ditch, and by the fall of rain the waters of the streams become so swollen as to render it necessary to cut the embankment of the ditch to preserve it from injury, and the owners of the ditch cut the embankment at a point where there is no natural water-course, so that the waters are turned on to cultivated land, causing injury thereto, the injury thereby sustained is not the act of God, but results from negligence, and the owners of the ditch are liable therefor. 25 *Cal.* 398.

SEC. 38. A may not, in order to save his own property, destroy the property of B, however urgent the necessity. 25 *Cal.* 398.

SEC. 39. A river which is not within the ebb and flow of the tides may be, notwithstanding, a navigable stream in two events; first, when it is of sufficient depth and width to float vessels, boats or other water craft, used in the transportation of freight or passengers or both, and this has been extended to its capacity to float rafts of lumber. To go beyond this and attribute navigable properties to a stream which can only float a log, is carrying the doctrine entirely too far, and is turning a rule which was intended to protect the public into an instrument of serious detriment to individuals if not of actual private oppression. The important uses to which the waters of unnavigable streams are constantly applied would have no security or certainty under such a stretch of construction. Dams for the erection of mills, manufactories, canals for the purpose of irrigation, supplying mines or even to subserve navigation itself, would have to give way to the mere claim of the right to float a saw-log; and if a log, why not a plank or a fishing-rod? The idea of navigation certainly never contemplated such a definition or such results. The other instance in which a stream is navigable is when it is expressly declared so by statute, and when so declared navigable to

a certain point by implication, it is declared non-navigable above that point. 6 *Cal.* 446.

CHAPTER XCVIII.

WITNESSES.

SECTION 1. No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief or by reason of his interest in the event of the action or proceeding or a party thereto or otherwise; but the party or parties thereto and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compelled to give evidence, either *viva voce* or by deposition, or upon a commission, in the same manner and subject to the same rules of examination as any other witness on behalf of himself or any of the parties to the action or proceeding. *Pr. Act*, 392.

SEC. 2. The following persons shall not be witnesses:

1st. Those who are of unsound mind at the time of their production for examination.

2d. Children under ten years of age who, in the opinion of the court, appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly.

2d. Mongolians, Chinese or Indians, or persons having one-half or more of Indian blood, in an action or proceeding wherein a white person is a party.

4th. Persons against whom judgment has been rendered upon a conviction for a felony, unless pardoned by the governor or such judgment has been reversed on appeal. *Pr. Act*, 394.

SEC. 3. A husband may be a witness for or against his wife, and a wife may be a witness for or against her husband; and where husband and wife are parties to an action or proceeding, they or either of them may be examined as witnesses in their own behalf or in behalf of each other, or

in behalf of any of the parties thereto, the same as any other witness; but this section shall not apply to cases of divorce, neither shall any husband or wife be competent or compellable to disclose any communication made to him or her by the other during marriage. *Pr. Act*, 395.

SEC. 4. An attorney or counselor shall not, without the consent of his client, be examined as a witness as to any communication made by the client to him or his advice given thereon in the course of professional employment. *Pr. Act*, 396.

SEC. 5. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs. *Pr. Act*, 397.

SEC. 6. A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient: *provided*, however, in any suit or prosecution against a physician or surgeon for malpractice, if the patient or party suing or prosecuting shall give such consent and any such witness shall give testimony, then such physician or surgeon defendant may call any other physicians or surgeons as witnesses on behalf of defendant without the consent of such patient or party suing or prosecuting. *Pr. Act*, 398.

SEC. 7. A public officer shall not be examined as a witness as to communications made to him in official confidence when the public interest would suffer by the disclosure. *Pr. Act*, 399.

SEC. 8. The judge himself or any juror may be called as a witness by either party; but in such case it shall be in the discretion of the court or judge to order the trial to be postponed or suspended and to take place before another judge or jury. *Pr. Act*, 400.

SEC. 9. When a witness does not understand and speak the English language an interpreter shall be sworn to interpret for him. Any person a resident of the proper county may be summoned by any court or judge to appear

before such court or judge to act as interpreter in any action or proceeding. The summons shall be served and returned in like manner as a subpena. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of a contempt and may be punished accordingly. *Pr. Act*, 401.

SEC. 10. In all criminal actions when the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused the husband shall be a competent witness; but neither the husband nor wife shall be compelled or allowed to testify in such cases unless by consent of both of them: *provided*, that in all cases of personal violence upon either by the other, the injured party (husband or wife) shall be allowed to testify against the other. *Act approved Jan.* 31, 1866.

SEC. 11. Section three hundred and ninety-three of the practice act prohibiting any person giving testimony when the adverse party is the representative of a deceased person, was repealed April 2, 1870.

SEC. 12. In divorce cases either party to the action may be a witness on the trial, but no divorce shall be granted on their testimony unless corroborated by other evidence. *Pub. Laws*, 1870, 291.

CHAPTER XCIX.

FEES.

Fees of Justices.

SECTION 1. Following are the fees of justices in the several counties of this state except the county of Yuba: For filing each paper, twenty-five cents; issuing any writ or process by which suit is commenced, fifty cents; for entering every cause upon his docket, fifty cents; for issuing subpena, twenty-five cents; for administering an oath or affirmation, twenty-five cents; for each certificate, twenty-five cents; for issuing writ of attachment or of arrest, or for the delivery of property, fifty cents; for entering any final judgment, for

the first folio one dollar, for each additional folio twenty cents; for taking or approving any bond or undertaking, directed by law to be taken or approved by him, fifty cents; for taking justification to a bond, fifty cents; for swearing a jury, fifty cents; for taking deposition, per folio, twenty cents; for entering a satisfaction of a judgment, fifty cents; for copy of a judgment, order, docket, proceedings or paper in his office, for each folio, twenty cents; for issuing commission to take testimony, fifty cents; for issuing supersedeas to an execution, fifty cents; for making up and transmitting transcript and papers on appeal, one dollar and fifty cents; for issuing search-warrant, fifty cents; for issuing an execution, fifty cents; for celebrating marriage and returning certificate thereof to the recorder, five dollars; for all services and proceedings before a justice of the peace in the county of Los Angeles, in a criminal action or proceeding, whether on examination or trial, three dollars, to be collected from the defendant, but in no case shall the same be a charge against the county if not so collected; for taking bail, after commitment, in criminal cases, one dollar; for entering cause without process, one dollar; for entering judgment by confession and only on affidavit, as required in district court, three dollars; for entering every motion, rule, exception, order or default, twenty-five cents; for transcript of judgment, per folio, twenty cents: *provided*, that in the counties of Amador and Sierra, justices of the peace may lawfully charge, demand and receive, the fees allowed by an act to regulate fees of office, approved April 10th, 1855: *provided*, further, that in the counties of Alameda, Santa Clara, Santa Cruz, Monterey, Shasta and Sutter, each justice of the peace shall be allowed, in a civil action before him, the following fees and no others: For all services required to be performed by him before trial, two dollars; two dollars additional for each writ of attachment or replevin; for the trial and all proceedings subsequent thereto, including all affidavits, swearing witnesses and jury, and the entry of judgment and issue of execution thereon, three dollars; twenty-five cents for each hour actually occupied by the trial of each cause, and in all cases where judgment is rendered by default or confession, for all services, includ-

ing execution and satisfaction of judgment, three dollars. For certificate and transmitting transcript and papers of appeal, one dollar; for copies of papers or docket, per folio, fifteen cents; for issuing a search-warrant, to be paid by the party demanding the same, fifty cents; for celebrating a marriage and returning a certificate thereof to the county recorder, three dollars; for taking an acknowledgment of any instrument, for the first name fifty cents, for each additional name twenty-five cents; for taking deposition, per folio, fifteen cents; for administering an oath and certifying the same, twenty-five cents; for issuing a commission to take testimony, fifty cents; for all services and proceedings before a justice of the peace, in a criminal action or proceeding, whether on examination or trial, three dollars; for all services connected with the posting of estrays, including the transcript to the recorder, two dollars. In cases before justices of the peace, when the venue shall be changed, the justice before whom the action shall be brought, for al services rendered, including the making up and transmission of the transcript and papers, shall receive two dollars; and the justice before whom the trial shall take place shall receive the same fees as if the action had been commenced before him. All fees of justices of the peace, including those on trial and those on appeal, must be paid before the justice shall be compelled to forward any papers on appeal. For all services appertaining to the coroner's office which the coroner is unable to attend to, the justice of the peace shall receive the same fees as are allowed the coroner for similar services: *provided*, that in the county of Los Angeles no justice of the peace shall be entitled to receive, in full compensation for all services rendered by him in criminal cases, a sum exceeding three hundred dollars, in the aggregate, per annum.

SEC. 2. Each justice of the peace in Yuba county shall be allowed as fees in a civil action before him, for all services required to be performed by him before trial, two dollars; and for the trial and all proceedings subsequent thereto, including all affidavits, swearing witnesses and jury, and the entry of judgment and issue of execution thereon, five dollars; and in all cases where judgment is

rendered by default or confession for all services, including execution and satisfaction of judgment, three dollars; for all services and proceedings in a criminal action or proceeding, whether on examination or trial, three dollars; for taking bail, after commitment by another magistrate, fifty cents; for certificate and transmitting transcript and papers on appeal, one dollar and fifty cents; for copies of papers on docket, per folio, fifteen cents; for issuing a search warrant, to be paid by the party demanding the same, fifty cents; for celebrating a marriage and returning a certificate thereof to the county recorder, five dollars; for taking an acknowledgment of any instrument, for the first name, fifty cents; for each additional name, twenty-five cents; for taking depositions, per folio, fifty cents; for administering an oath and certifying the same, twenty-five cents; for issuing a commission to take testimony, fifty cents; for all services connected with the posting of estrays, including the transcript for the recorder, two dollars; in cases before justices of the peace, where the venue shall be changed, the justice before whom the action shall be brought, for all services rendered, including the making up and transmission of the transcript and papers, shall receive two dollars; and the justice before whom the trial shall take place shall receive the same fees as if the action had been commenced before him.

Fees of Constables.

SEC. 3. Constables shall receive as fees for serving summons in civil cases, for each defendant, fifty cents. For summoning any jury before a justice of the peace, including mileage, two dollars: *provided*, that in the counties of Amador and Butte he shall have two dollars and mileage. For making sales of estrays, the same fees as for sales on execution; for all other services, the same fees as are allowed to sheriffs for similar services. For services performed by the several officers under the act concerning water craft found adrift and lost money and property, passed April 5th, 1850, they shall receive the fees as are prescribed in said act: *provided*, that in the county of Los Angeles the constables therein shall receive in ful

compensation for all services rendered by them in criminal cases, a sum not to exceed three hundred dollars each per annum, in the aggregate: and *provided*, that in the county of San Joaquin, constables shall receive the same fees as the sheriff of said county is allowed for like services.

SEC. 4. In the counties of Alpine, Alameda, Amador, Butte, Colusa, Del Norte, Fresno, Inyo, Klamath, Kern, Lake, Lassen, Mariposa, Mono, Merced, Napa, Nevada, Placer, Plumas, San Diego, San Joaquin, San Luis Obispo, Shasta, Santa Barbara, Sierra, Solano, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, Sacramento and San Mateo, the constable shall receive the fees hereinafter specified: for serving an attachment on property, or levying an execution, or executing an order of arrest, or order for the delivery of personal property, two dollars; for serving an attachment upon any ship, boat or vessel, in proceedings to enforce any lien thereon created by law, three dollars; for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution or other process, such sum as the court shall order, provided that no more than three dollars per diem shall be allowed to a keeper; for taking bond or undertaking in any case in which he is authorized to take the same, one dollar; for copy of any writ, process or other paper, when demanded or required by law, for each folio, twenty cents; for serving every notice, rule or order, one dollar; for advertising property for sale on execution or under any judgment or order of sale, exclusive of the cost of publication, each notice, one dollar; for holding each inquest or trial of right of property, to include all service in the matter, except mileage, three dollars; for serving a subpena, for each witness summoned, fifty cents; for commissions for receiving and paying over money on execution or other process, when lands or personal property have been levied on and sold, three per cent.; for commissions for receiving and paying over money on execution without levy or where the lands or goods levied on shall not be sold, one and one-half per cent.; the fees herein allowed for the levy of an execution, costs for advertising and percentage for making or collecting the money on execution, shall be col-

lected from the judgment-debtor, by virtue of such execution, in the same manner as the sum herein directed to be made; for drawing and executing a deed, to include the acknowledgment, exclusive of stamps, to be paid by the grantee before delivery, three dollars and fifty cents; for executing a certificate of sale, exclusive of the filing and recording of the same, one dollar; for making every arrest in a criminal proceeding, two dollars; for summoning a trial jury of twelve persons or less, four dollars; for summoning each additional juror, twenty-five cents; for every mile necessarily traveled, in going only, in executing any warrant of arrest, subpena or venire, bringing up a prisoner on *habeas corpus*, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding: *provided*, that in serving a subpena or venire, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged, thirty cents; *provided*, further, that in the counties of Amador and Sacramento, for every mile necessarily travelled, in any criminal case, twenty cents; for conveying a prisoner, when under arrest, the necessary expenses incurred in the transportation.

SEC. 5. In the counties of Sonoma, Mendocino and Marin, the constable shall be entitled to receive the fees hereinafter specified: For serving a summons on each defendant, fifty cents; for serving an attachment on property, or levying an execution, or executing an order of arrest or order for the delivery of personal property, one dollar and twenty-five cents; for serving an attachment upon any ship, boat or vessel, in proceedings to enforce any lien thereon created by law, one dollar and twenty-five cents; for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution or other process, as the court shall order: *provided*, that no more than three dollars per diem shall be allowed to a keeper, three dollars; for taking bond or undertaking in any case in which he is authorized to take the same, forty cents; for copy of any writ, process or other paper, when demanded or required by law, for each folio, fifteen cents; for serving every notice, rule or order, forty cents; for advertising property for sale on execution or under any judgment or

order of sale, exclusive of the cost of publication, each notice, one dollar; for holding each inquest, or trial of right of property, to include all services in the matter except mileage, three dollars; for serving a subpena for each witness summoned, forty cents; for commissions for receiving and paying over money on execution or other process when lands or personal property has been levied on and sold, on the first one thousand dollars, two per cent.; for commissions for receiving and paying over money on execution without levy, or when the lands or goods levied on shall not be sold, on the first one thousand dollars, one and one-half per cent. The fees herein allowed for the levy of an execution, costs for advertising and per centage for making or collecting the money on execution shall be collected from the judgment-debtor, by virtue of such execution in the same manner as the sum therein directed to be made. For drawing and executing a deed, to include the acknowledgment, exclusive of stamps, to be paid by the grantee before delivery, three dollars and fifty cents; for executing a certificate of sale exclusive of the filing and recording of the same, one dollar; for attending when required on any court, in person or by deputy, for each day, to be paid out of the county treasury, three dollars; for making every arrest in a criminal proceeding, one dollar and fifty cents; for summoning a trial jury of twelve persons or less, four dollars; for summoning each additional juror, twenty cents; for every mile necessarily traveled in executing any warrant of arrest, subpena or venire, bringing up a prisoner on *habeas corpus*, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding: *provided*, that in serving a subpena or venire, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged, forty cents, in going only; for conveying a prisoner when under arrest, the necessary expenses incurred in the transportation.

SEC. 6. In the counties of Contra Costa, Humboldt, Monterey, Santa Clara, Los Angeles, Santa Cruz and Tulare, the constable shall be entitled to receive the fees hereinafter specified: For serving on each defendant one dollar; for taking bond or undertaking in any case in which

he is authorized to take the same, fifty cents; for copy of any writ, process or other paper, when demanded or required by law, for each folio, fifteen cents; for serving every notice, rule or order, fifty cents; for serving a subpena, for each witness summoned, twenty-five cents; for serving an attachment on property, or levying an execution, or executing an order of arrest or order for the delivery of personal property, one dollar and fifty cents; but no travelling fees shall be allowed on such attachment, order of arrest or order for the delivery of personal property, when the same accompanies the summons in the suit, and may be executed at the time of the service of the summons, unless for the distance actually travelled beyond that required to serve the summons; he shall be allowed such further compensation for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution or other process as the court shall order: *provided,* no more than three dollars per diem shall be allowed to a keeper. For serving an attachment upon any ship, boat or vessel, in proceedings to enforce any lien thereon created by law, one dollar and fifty cents; also, three dollars per day for each day while such ship, boat or vessel, is in the actual custody of the constable, and such further necessary expenses incurred in serving the process and resulting from such custody as are supported by the oath of the officer making such service and allowed by the court; for selling any boat, vessel or tackle, apparel or furniture thereof so attached, or other goods attached, and for advertising such sale, the same fees as for sale on execution; for advertising property for sale on execution or under any judgment or order of sale, exclusive of the cost of publication, one dollar; for commissions for receiving and paying over money on execution or other process, when lands or personal property has been levied on and sold, on the first one thousand dollars, two per cent.; for commissions for receiving and paying over money on execution without levy, or when the lands or goods levied on shall not be sold, on the first one thousand dollars, one and one-half per cent.; the fees herein allowed for the levy of an execution, and for advertising and for making or collecting

the money on execution, shall be collected from the judgment-debtor by virtue of such execution, in the same manner as the sum therein directed to be made; for drawing and executing a deed, inclusive of acknowledgment and exclusive of stamps, four dollars, to be paid by the grantee; for holding each inquest, or trial of right of property, to include all service in the matter, except mileage, three dollars; for making every arrest in a criminal proceeding, two dollars; for summoning a trial jury, in any case, three dollars; for each additional juror, twenty cents.

SEC. 8. The following are the fees of constable in Yuba county: For serving summons in civil cases, for each defendant, fifty cents; for summoning any jury before a justice of the peace, one dollar; for taking a bond required by law to be taken, fifty cents; for summoning each witness, fifteen cents; for serving an attachment against the property of a defendant, one dollar and fifty cents; for summoning and swearing a jury to try the right of property and taking the verdict, one dollar and fifty cents; for receiving and taking care of property on execution, attachment or order, his actual necessary expenses, to be allowed by the justice who issued the execution, upon the affidavit of the constable that such charges are correct and the expenses were necessarily incurred; for collecting all sums on execution, two per cent., to be charged against the defendant in the execution; for serving a warrant or order for the delivery of personal property or for making an arrest in civil cases, one dollar and fifty cents; for making an arrest in criminal cases, one dollar and fifty cents; for every mile necessarily traveled, in going only, to serve any civil or criminal process or paper, or to take a prisoner before a magistrate or to prison, twenty cents, but when two or more persons are summoned or served in the same suit, mileage shall be charged only for the most distant if they live in the same direction; for copy of any writ, process or paper, when demanded or required by law, for each folio, twenty cents; for serving every notice, rule or order, one dollar; for serving an attachment upon any ship, boat or vessel, in proceeding to enforce any lien thereon created by law, two dollars; also, three dollars per day for each day

while such ship, boat or vessel, is in the actual custody of the constable, and such further necessary expenses incurred in serving the process and resulting from such custody as are supported by the oath of the officer making such service and allowed by the court; for selling any boat, vessel or tackle, apparel or furniture thereof, so attached, or other goods attached, and for advertising such sale, the same fees as for sale on execution; for advertising property for sale on execution or under any judgment or order of sale, exclusive of the costs of publication, two dollars; for commissions for receiving and paying over money on an execution or other process, when lands or personal property have been levied on and sold, on the first one thousand dollars, two per cent.; on all sums above that amount, one per cent. The commissions for receiving and paying over money on execution without levy or where the lands or goods levied on shall not be sold, on the first one thousand dollars, one and one-half per cent., and one per cent. on all over that sum; the fees herein allowed for the levy of an execution and for advertising, and for making or collecting the money or execution, shall be collected from the judgment-debtor by virtue of such execution in the same manner as the sum therein directed to be made. For drawing and executing a constable's deed, to include the acknowledgment, three dollars, to be paid by the grantee; for serving a writ of possession or restitution, putting any person entitled into possession of premises and removing the occupant, five dollars; for attending, when required, on any court, in person or by deputy, for each day, to be paid out of the county treasury, three dollars; for holding each inquest or trial of right of property, to include all service in the matter except mileage, five dollars.

PART SECOND:

CRIMINAL JURISDICTION.

TABLE OF CONTENTS.

PART SECOND.

CHAPTER I. SECTIONS.

General Definitions and Provisions 1– 18

CHAPTER II.

Of the Prevention of Public Offenses 19– 22

CHAPTER III.

Of the Intervention of the Officers of Justice 23

CHAPTER IV.

Security to Keep the Peace 24– 47

CHAPTER V.

Police in Cities and Towns and their Attendance at Exposed Places 48– 49

CHAPTER VI.

Suppression of Riots 50– 60

CHAPTER VII.

Of the Removal of Civil Officers otherwise than by Impeachment 61– 73

CHAPTER VIII.

Of the Proceedings in Criminal Actions Prosecuted by Indictment 74– 85

CHAPTER IX.

Of the Time of Commencing Criminal Actions 86– 91

CHAPTER X.

Of the Complaint and the Officers Authorized to Hear it 92– 94

CHAPTER XI.

Warrant of Arrest 95–124

CHAPTER XII.

Arrest by an Officer under Warrant 125–134

CHAPTER XIII.

Arrest by an Officer without a Warrant 135–140

CHAPTER XIV.

Arrest by a Private Person 141–144

CHAPTER XV.

Retaking after an Escape or Rescue 145–146

CHAPTER XVI.

Examination of the Case and Discharge of the Defendant, etc. 147–182

CHAPTER XVII.

Of Proceedings after Commitment and before Indictment 183–185

CHAPTER XVIII.

Powers and Duties of a Grand Jury 186–189

CHAPTER XIX. SECTIONS.
PRESENTMENT AND PROCEEDINGS THEREON.....190-196
CHAPTER XX.
FORM OF INDICTMENT.....197-200
CHAPTER XXI.
CHALLENGING THE JURY.....201-244
CHAPTER XXII.
APPEALS, WHEN ALLOWED AND HOW TAKEN.....245-265
CHAPTER XXIII.
IN WHAT CASES DEFENDANT MAY BE ADMITTED TO BAIL.....266-274
CHAPTER XXIV.
BAIL UPON BEING HELD TO ANSWER BEFORE INDICTMENT.....275-280
CHAPTER XXV.
BAIL UPON INDICTMENT BEFORE CONVICTION.....281-284
CHAPTER XXVI
BAIL ON APPEAL.....285-288
CHAPTER XXVII.
DEPOSIT INSTEAD OF BAIL.....289-291
CHAPTER XXVIII.
SURRENDER OF THE DEFENDANT.....292-295
CHAPTER XXIX.
FORFEITURE OF THE RECOGNIZANCE OR OF THE DEPOSIT OF MONEY....296-299
CHAPTER XXX.
RECOMMITMENT OR THE DEFENDANT AFTER HAVING GIVEN BAIL.....300-306
CHAPTER XXXI.
COMPELLING THE ATTENDANCE OF WITNESSES.....307-317
CHAPTER XXXII.
INQUIRY INTO THE INSANITY OF THE DEFENDANT, ETC..... 318
CHAPTER XXXIII.
ENTITLING AFFIDAVITS..... 319
CHAPTER XXXIV.
ERRORS AND MISTAKES IN PLEADING AND OTHER PROCEEDINGS.....320-325
CHAPTER XXXV.
DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.....326-331
CHAPTER XXXVI.
OF PROCEEDINGS IN JUSTICES', RECORDERS' AND MAYORS' COURTS.....332-377
CHAPTER XXXVII.
OF SEARCH-WARRANTS.....378-400
CHAPTER XXXVIII.
OF PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.....401-410
CHAPTER XXXIX.
COMPROMISING OFFENSES BY LEAVE OF COURT.....411-417
CHAPTER XL.
MISCELLANEOUS PROVISIONS.....418-423
CHAPTER XLI.
OF THE COSTS IN CRIMINAL ACTIONS AND PROCEEDINGS.....424-432
CHAPTER XLII.
OF SUPPLEMENTAL ACTS.....433-436

CRIMINAL JURISDICTION.

CHAPTER I.

GENERAL DEFINITIONS AND PROVISIONS.

1. Section 2. A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments: 1st. Death. 2d. Imprisonment. 3d. Fine. 4th. Removal from office. 5th. Disqualification to hold or enjoy any office of honor, trust or profit, under this state.

2. Sec. 3. Public offenses are divided into: 1st. Felonies. 2d. Misdemeanors.

3. Sec. 4. A felony is a public offense punishable by death or by imprisonment in a state prison.

4. Sec. 5. Every other public offense is a misdemeanor.

5. Sec. 6. No person can be punished for a public offense, except upon legal conviction in a court having jurisdiction thereof.

6. Sec. 7. Every public offense must be prosecuted by indictment, except: 1st. Where proceedings are had for the removal of civil officers of the state. 2d. Offenses arising in the militia when in actual service, and in the land and naval forces in time of war, or which this state may keep with the consent of congress in time of peace. 3d. Offenses tried in justices', recorders' and mayors' courts.

7. Sec. 8. The proceedings by which a party charged with a public offense is accused and brought to trial and punishment, shall be known as a criminal action.

8. Sec. 9. A criminal action shall be prosecuted in the name of the people of the state of California as a party against the party charged with the offense.

9. Sec. 10. The party prosecuted in a criminal action is designated in this act as the defendant.

10. Sec. 11. In a criminal action the defendant is entitled: 1st. To a speedy and public trial. 2d. To be allowed counsel as in civil actions or he may appear and defend in person or with counsel. 3d. To produce witnesses on his behalf and to be confronted with the witnesses against him in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has either in person or by counsel cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people,

who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has either in person or by counsel cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read upon its being satisfactorily shown to the court that he is dead or insane or cannot with due diligence be found within the state.

11. In a criminal case if the court impose upon counsel against their consent a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived by the limitation of the opportunity of a full defense; for this is his constitutional right, without which he cannot be lawfully convicted. Courts have a large discretion over the conduct of proceedings before them and may limit counsel to reasonable time. But in criminal cases this should be done, if at all, only in very extraordinary and peculiar instances. 13 *Cal.* 581.

12. Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary. But a confession is presumed to be voluntary unless the contrary is shown. 10 *Cal.* 60.

13. SEC. 12. No person shall be subject to a second prosecution for a public offense for which he has once been prosecuted and duly convicted or acquitted.

14. A court cannot in a case where the prisoner has been acquitted of an alleged crime arrest the judgment and retry the cause. The court has no longer any jurisdiction over him. The word "issue" in section 439, criminal code, means the issue in controversy, not the one that has been settled by the jury and found in favor of the defendant; and the words, "placing the parties in the same position that they occupied before the trial," simply apply in reference to the issues undisposed of.

15. The defendant was convicted of manslaughter upon an indictment charging the crime of murder. The verdict was on his motion set aside: *Held*, that to a second trial for murder, upon the same or a different indictment, defendant can plead the former conviction of manslaughter as an acquittal of the crime of murder, and that under the same indictment the defendant may be again tried and convicted for manslaughter. 4 *Cal.* 376.

16. A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must, by legal operation, amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty. If such were not the case the party, after undergoing punishment for manslaughter, might be arraigned and tried again for murder, notwithstanding he had been compelled to answer this charge upon the first trial and the jury had passed upon the same. 4 *Cal.* 376, 377. The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence would be, for the effect of both is to exempt him from the penalty of the law for such crime. 4 *Cal.* 377.

17. SEC. 13. No person shall be compelled in a criminal action to be a witness against himself, nor shall a person charged with a public offense be subjected before conviction to any more restraint than is necessary for his detention to answer the charge.

18. SEC. 14. No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer to the indictment in the case mentioned in section two hundred and ninety-three.

CHAPTER II.

OF THE PREVENTION OF PUBLIC OFFENSES.

19. SEC. 15. Lawful resistance to the commission of a public offense may be made: 1st. By the party about to be injured. 2d. By other parties.

20. SEC. 16. Resistance sufficient to prevent the offense may be made by the party about to be injured: 1st. To prevent an offense against his person or his family, or some member thereof. 2d. To prevent an illegal attempt by force to take or injure property in his lawful possession.

21. The owner of property in possession of the same, has a right to use such force as is necessary to prevent a forcible trespass, and if in doing so he is compelled to kill the trespasser he is justifiable. If the trespasser is not armed and simply attempts the trespass without force of arms, and neither intends nor endeavors to commit a felony himself, then the owner would not be justified in killing him. But when the trespasser goes with the intent and with the means to commit a felony if necessary to ac-

complish the end intended, the owner of the property may repel force by force. 8 *Cal.* 343, 344.

22. If A go to the house of B, who has taken possession of his land and built a house thereon, for the purpose of forcibly putting him out and tearing down the house, it is an unlawful act, and if A kills B in pursuing that purpose it is murder or manslaughter, according to the facts of the case. 10 *Cal.* 83.

23. SEC. 17. Any other person in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

CHAPTER III.

OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

24. SEC. 18. Public offenses may be prevented by the intervention of the officers of justice: 1st. By requiring security to keep the peace. 2d. By forming a police in cities and towns, and by requiring their attendance in exposed places. 3d. By suppressing riots.

SEC. 19. Whenever the officers of justice are authorized to act in the prevention of public offenses, other persons who by their command act in their aid, are justified in so doing.

CHAPTER IV.

SECURITY TO KEEP THE PEACE.

25. SEC. 20. A complaint may be laid before any of the magistrates mentioned in section one hundred and three, that a person has threatened to commit an offense against the person or property of another.

26. Before the institution of the office of justice of the peace in England, the public order was maintained by officers who bore the name of conservators of the peace, and they were empowered to preserve the peace, to suppress riots and affrays, to take securities for the peace, and to apprehend and commit felons and other inferior criminals. The same power is conferred upon a variety of officers in England and the United States by simply declaring them by statute to be conservators of the peace, and the constitution of this state confers the same authority

in the same terms upon the justices of this court and the district judges. 1 *Cal.* 13.

27. Between preparation for an attempt and an attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of an offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: a party may purchase and load a gun with the declared intention to shoot his neighbor, but until some movement is made to use the weapon upon the person of his intended victim there is only preparation and not an attempt. For the preparation he may be held to keep the peace: but he is not chargeable with any attempt to kill. 14 *Cal.* 159, 160.

28. SEC. 21. When the complaint is laid before the magistrate, he shall examine on oath the complainant and any witnesses he may produce, and shall take their depositions in writing and cause them to be subscribed by the parties making them.

29. SEC. 22. If it appears from the depositions that there is just reason to fear the commission of the offense threatened by the person so complained of, the magistrate shall issue a warrant, directed generally to the sheriff of the county or any constable, marshal or policeman in the state, reciting the substance of the complaint and commanding the officer forthwith to arrest the person complained of and bring him before the magistrate.

30. SEC. 23. When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate shall take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses.

31. SEC. 24. If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of shall be discharged.

32. SEC. 25. If, however, there be just reason to fear the commission of the offense, the person complained of may be required to enter into a bond in such sum, not exceeding five thousand dollars, as the magistrate may direct, with one or more sufficient securities, to keep the peace towards the people of this state, and particularly towards the complainant. The bond shall be valid and binding for six months, and may, upon the renewal of the complaint, be extended for a longer period, or a new bond may be required.

33. SEC. 26. If the bond required by the last section be given the party complained of shall be discharged. If he do not give it, the magistrate shall commit him to prison, specifying in the warrant the requirement to give security, the amount thereof and the omission to give the same.

34. SEC. 27. If the person complained of be committed for not giving the bond required, he may be discharged by any magistrate upon giving the same.

35. SEC. 28. A bond given, as provided in section twenty-five, must be filed by the magistrate in the office of the clerk of the county.

36. SEC. 29. Any person who, in the presence of a court or magistrate, shall assault or threaten to assault another or to commit any offense against his person or property, or who shall contend with another with angry words, may be ordered by the court or magistrate to give security, as is provided in section twenty-fifth, or, if he refuse to do so, may be committed, as provided in section twenty-sixth.

37. SEC. 30. A bond to keep the peace shall be broken on conviction of the person complained against of a breach of the peace.

38. SEC. 31. Upon the district attorney's producing evidence of such conviction to the county court of the county, the court shall order the bond to be prosecuted, and the district attorney shall thereupon commence an action on the same, in the name of the people of this state.

39. SEC. 32. In the action, the offense stated in the record of conviction shall be alleged as a breach of the bond, and shall be conclusive evidence thereof.

40. SEC. 33. No security to keep the peace or be of good behavior shall be required except as prescribed in this chapter.

41. The following is a form of complaint to obtain surety of peace:

In the justice's court of .... township, in the county of ...., state of ....

State of .....
county of ..... } ss.

Personally appeared before me this .... day of ...., 18 .., ..., who deposes and says, that on the .... day of ...., 18.., one ...., in said county, did threaten to beat, bruise or wound [or, "kill," or "commit other offense," as the case may be], and that he has just cause to fear, and does fear, that the said .... will beat, bruise or wound [or, etc.] him, this deponent; all of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the state of ..... Wherefore deponent prays that a warrant may be issued for the arrest of ...., and that he may be brought before a magistrate and dealt with according to law.

....

Subscribed and sworn to before me, this .... day of ...., 18...

....
Justice of the peace.

42. The following is a form of warrant of arrest:

In the justice's court of the .... township, in the county of ...., state of ....

State of .....
county of ..... } ss.

The people of the state of .... to any sheriff, constable, marshal or policeman, in the county of ..... A complaint, upon oath, having been this day laid before me, by ...., in said county, that .... did threaten to beat, etc. [here state the allegations], and that he has just cause to fear, and does fear, that the said .... will beat, etc. [here repeat the allegation] him, the said ...., [if the threat be to injure property state the facts as alleged], you are therefore commanded forthwith to arrest the above-named .... and bring him before me forthwith, at my office in

said township in said county of....., or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at my office in said township, in said county of...., this .... day of ...., A.D. 18..,

....

Justice of the peace of said township.

43. The following is a return of the sheriff or constable to be indorsed on the warrant:

I hereby certify that I received the within warrant on the .... day of ...., A. D. 18.., and served the said warrant by arresting the within-named defendant and bringing him before....., justice of the peace in said township, [or, "and the said ..... being absent or unable to act, before ....., who is the nearest magistrate in this county."]

....

Constable for .... township.

44. If, from any cause the examination cannot be had at the time the writ shall have been returned, the accused may be admitted to bail until the day appointed for the examination. If, however, he shall fail to give the required bail, he shall be committed for examination to the sheriff of the county.

The following is the form of certificate :

The within named .... having been brought before me under this warrant, and the examination having been continued upon the facts set forth in the affidavit of defendant [or, " complaint as the case may be"] it was ordered that the said defendant give bond with sufficient security that he will appear for examination on the ... day of .... A. D. 1870, and said defendant refusing to do so was committed for examination to the sheriff of the county of....

Dated this....day of....A. D., 187..

....

Justice of the Peace of said township.

If, however, the said bond be given, insert "and said bond having been given" as required, said .... was discharged until the day set for examination.

45. The following is a form of order of discharge :

State of .....
county of ..... }
In justices' court of township.

The within-named defendant was arrested and brought before me .... justice of the peace in and for said township, on the .... day of ..., A. D. 187..; and after hearing the testimony produced by said complainant, in support of the allegations in his complaint, and duly considering the same, I find no just reason why said complainant should fear the commission of

the injuries therein alleged. It is therefore ordered that said defendant be and he is hereby discharged.

Dated at .... township, ... January 1st, 18....

.... Justice.

[If, however, the justice find the complaint true, he shall commit the defendant, unless he give such bond as the justice shall order.]

46. The following is the form of a peace bond:

State of .....
county of.....
..... court.

Personally appeared in the .... court....in and for the....county of ...., in open court....and acknowledged themselves and each of them justly indebted to the people of the State of California, in the sum of .... dollars.

Sealed with their seals, and dated this .... day of ..., A. D. 18....

..... [L. S.]

The condition of the above obligation is such, that whereas the above bounden ...., has been held to keep the peace by order of .... of said.... made on the .... day of .... A. D. 18...

Now, if the said above bounden .... shall well and truly keep the peace towards the people of the State of California, and particularly towards .... of said.... for the space of six months from the date of said order, then this objection is to be null and void, otherwise to remain in full force and effect.

Signed and sealed the day and year first above written.

..... [L. S.]

Witnessed and approved by me this .... day of .... A. D. 18...

..... [L. S.]

..... [L. S.]

47. The following is a form of commitment on complaint to obtain surety of the peace:

State of .....
county of....
} ss.

To the sheriff of said county, greeting:

Whereas, ... this day made complaint to me in writing, on oath, that .... on the .... day of .... last past, threatened to, etc. [as in the complaint]; and, whereas, it appearing to me upon the examination of said complaint,.... and ... witnesses, duly made on oath, reduced to writing and subscribed by them, that there was just reason to fear the commission of said offense by the said ....; and he being brought before me on my warrant, was required to enter into recognizance in the sum of .... with sufficient surety to keep the peace towards the people of this state, and particularly toward said complainant for the period of six months; and the said .... having refused [or, "neglected"] to find such security, you are therefore commanded in the name of the people of the State of California, forthwith to convey him to the common jail of the said county and to deliver him to the keeper thereof, who is hereby required to receive the

said .... into his custody, and him safely keep in the said jail until he shall find such security or he be discharged by due course of law.

Witness, etc.

....., ...,
Justice of the Peace.

CHAPTER V.

POLICE IN CITIES AND TOWNS AND THEIR ATTENDANCE AT EXPOSED PLACES.

48. SEC. 34. The organization and regulation of the police in cities and towns in this state are governed by special laws.

49. SEC. 35. The mayor or other officer having the direction of the police in a city, town or village, shall order a force sufficient to keep the peace to attend any public meeting when he is satisfied that a breach of the peace is to be apprehended.

CHAPTER VI.

SUPPRESSION OF RIOTS.

50. SEC. 36. When a sheriff or other public officer authorized to execute process shall find or have reason to apprehend that resistance will be made to the execution of his process, he may command as many male inhabitants of his county as he may think proper, and any military company or companies in the county, armed and equipped, to assist him in overcoming the resistance, and, if necessary, in seizing, arresting and confining the resisters and their aiders and abettors, to be punished according to law.

51. SEC. 37. The officer shall certify to the court from which the process issued, the names of the resisters and their aiders and abettors, to the end that they may be proceeded against for their contempt of court.

52. SEC. 38. Every person commanded by a public officer to assist him in the execution of process as provided in section thirty-six, who shall without lawful cause refuse or neglect to obey the command, shall be deemed guilty of a misdemeanor.

53. SEC. 39. If it appear to the governor that the power of any county is not sufficient to enable the sheriff to execute the process delivered to him, he shall, on the application of the sheriff, order such military force from any other county or counties as shall be necessary.

54. SEC. 40. Where six or more persons, whether armed or not, shall be unlawfully or riotously assembled in any city or town, the sheriff of the county and his deputies, the mayor and aldermen of the city, or the constable of the town and the justice of the peace, shall go among the persons so assembled, or near to them as possible, and shall command them in the name of the people of the state immediately to disperse.

55. SEC. 41. If the persons assembled do not immediately disperse, the

magistrate and officers shall arrest them, that they may be punished according to law; and for that purpose may command the aid of all persons present or within the county.

56. SEC. 42. If a person so commanded to aid the magistrates or officers neglect or refuse to do so, he shall be deemed guilty of a misdemeanor and shall be punished accordingly.

57. SEC. 43. If a magistrate or officer, having notice of an unlawful or riotous assembly: as provided in section forty, neglect to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he shall be deemed guilty of a misdemeanor.

58. SEC. 44. If the persons so assembled and commanded to disperse do not immediately disperse, any two of the magistrates or officers before mentioned may command the aid of a sufficient number of persons, and may proceed in such manner as in their judgment is necessary to disperse the assembly and arrest the offenders.

59. SEC. 45. When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly or arresting the offenders, it shall obey such orders in relation thereto as may have been made by the governor or by a judge of a court of record, or the sheriff of the county, or by any two of the magistrates or officers mentioned in section forty.

60. SEC. 48. When the governor shall be satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted and has not been sufficient to enable the officer having the process to execute it, he may on the application of the officer, or of the district attorney, or county judge of the county, by proclamation to be published in such papers as he shall direct, declare the county to be in a state of insurrection, and may order into the service of the state such number and description of volunteer or uniform companies or other militia of the state as he shall deem necessary, to serve for such term and under the command of such officer or officers as he shall direct.

CHAPTER VII.

OF THE REMOVAL OF CIVIL OFFICERS OTHERWISE THAN BY IMPEACHMENT.

61. SEC. 70. An accusation in writing against any district, county or township officer for willful or corrupt misconduct in office may be presented by the grand jury of the county for which the officer accused is elected o appointed.

62. SEC. 71. The accusation shall state the offense charged in ordinary and concise language and without repetition.

63. SEC. 72. The accusation shall be delivered by the foreman of the grand jury to the district attorney of the county, who shall cause a copy thereof to be served upon the defendant, and require by notice in writing

of not less than ten days that he appear before the district court of the county at the next term and answer the accusation. The original accusation shall then be filed with the clerk of the district court.

64. SEC. 73. The defendant must appear at the time appointed in the notice and answer the accusation, unless for some sufficient cause the court assign another day for that purpose. If he do not appear, the court may proceed to hear and determine the accusation in his absence.

65. SEC. 74. The defendant may answer the accusation, either by objecting to the sufficiency thereof or of any article therein, or by denying the truth of the same.

66. SEC. 75. If he object to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it present intelligibly the grounds of the objection.

67. SEC. 76. If he deny the truth of the accusation, the denial may be oral and without oath, and shall be entered upon the minutes.

68. SEC. 77. If an objection to the sufficiency of the accusation be not sustained the defendant shall be required to answer the accusation forthwith.

69. SEC. 78. If the defendant plead guilty or refuse to answer the accusation, the court shall render judgment of conviction against him. If he deny the matters charged the court shall immediately, or at such a time as they may appoint, proceed to try the accusation.'

70. SEC. 79. The trial shall be by a jury, and shall be conducted in all respects in the same manner as the trial of an indictment for a misdemeanor.

71. SEC. 80. The district attorney and the defendant shall be respectively entitled to such processes as may be necessary to enforce the attendance of witnessess as upon a trial of an indictment.

72. SEC. 81. Upon a conviction, the court shall immediately or at such other time as the court may appoint, pronounce judgment that the defendant be removed from office; but to warrant a removal, the judgment must be entered upon the minutes, assigning therein the causes of such removal.

73. SEC. 82. From a judgment of removal an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but until such judgment be reversed the defendant shall be suspended from his office. Pending the appeal, the office may be filled as in case of vacancy.

CHAPTER VIII.

OF THE PROCEEDINGS IN CRIMINAL ACTIONS PROSECUTED BY INDICTMENT.

74. SEC. 84. Every person whether an inhabitant of this or any other state or county, or of a territory or district of the United States, shall be liable to punishment by the laws of this state for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.

75. SEC. 85. When the commission of a public offense commenced without the state is consummated within the boundaries thereof, the defendant shall be liable to punishment in this state, though he were without the state at the time of the commission of the offense charged: *provided*, he consummated the offense through the intervention of an innocent or guilty agent without this state, or any other means proceeding directly from himself, and in such case the jurisdiction shall be in the county in which the offense is consummated.

76. SEC. 86. When an inhabitant or resident in this state shall by any previous appointment or engagement fight a duel or be concerned as a second therein without the jurisdiction of this state, and in such duel a wound shall be inflicted on any person whereof he shall die within the state, the jurisdiction of the offense shall be in the county where the death shall happen.

77. SEC. 87. When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction shall be in either county.

78. SEC. 88. When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction shall be within either county.

79. SEC. 89. When an offense is committed within this state on board a vessel navigating a river, bay or alue, or lying therein in the prosecution of her voyage, the jurisdiction shall be in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate.

80. SEC. 90. The jurisdiction of an indictment for the crime of forcibly stealing, taking or arresting any man, woman or child in this state and carrying him or her into any other county, state or territory, or for forcibly taking or arresting any person or persons whomsoever, with a design to take him or her out of this state, without having established a claim according to the laws of the United States, or for hiring, persuading, enticing, decoying or seducing by false promises, misrepresentations, and the like, any negro, mulatto or colored person to go out of this state, to be taken or removed therefrom for the purpose and with the intent to sell such negro, mulatto or colored person into slavery or involuntary servitude, or otherwise to employ him or her for his or her own use or for the use of another, without the free will and consent of such negro, mulatto or colored person, shall be in any county in which the offense was committed, or into or out of which the person upon whom the offense was committed may in the prosecution of the offense have been brought, or in which an act shall be done by the offender in investigating, procuring, promoting, aiding in, or being accessory to the comission of the offense, or in abetting the parties therein concerned.

81. SEC. 91. When the offense either of bigamy or incest is committed in one county and the defendant is apprehended in another, the jurisdiction shall be in either county.

82. SEC. 92. When property feloniously taken in one county by burglary, robbery, larceny or embezzlement, has been brought into another, the jurisdiction of the offense shall be in either county. But if at any time before the conviction of the defendant in the latter, he be indicted in the former county, the sheriff of the latter county shall upon demand deliver him to the

sheriff of the former county, upon being served with a copy of the indictment and upon receipt, indorsed thereon by the sheriff of the former county, of the body of the offender, and shall on filing the copy of the indictment and receipt, be exonerated from all liability in respect to the custody of the offender.

83. SEC. 93. In the case of an accessory before or after the fact in the commission of a public offense, the jurisdiction shall be in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county.

84. SEC. 94. When an act charged as a public offense is within the jurisdiction of another state or territory, as well as of this state, a conviction or acquittal thereof in such state or territory shall be a bar to a prosecution therefor in this State.

85. SEC. 95. When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county shall be a bar to a prosecution or indictment therefor in another.

CHAPTER IX.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

86. SEC. 96. There shall be no limitation of time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

87. SEC. 97. An indictment for any other felony than murder must be found within three years after its commission.

88. SEC. 98. An indictment for any misdemeanor must be found within one year after its commission.

89. SEC. 99. If, when the offense is committed the defendant be out of the state, the indictment may be found within the term herein limited after his coming within the state, and no time during which defendant is not an inhabitant of, or usually resident within the state, shall be a part of the limitation.

90. The last section includes the case of a defendant leaving the state after the commission of the crime as well as the case of his absence from the state at the time of its perpetration, and applies to all offenses. *People* vs. *Montejo*, 18 Cal. 38.

91. If the defendant is out of the state a portion of the time it must be so averred in the indictment. *Prima facie* the lapse of time is a good defense, and where the statutory exception is relied on, it must be set up. *People* vs. *Miller*, 12 Cal. 291.

CHAPTER X.

OF THE COMPLAINT AND THE OFFICERS AUTHORIZED TO HEAR IT.

92. SEC. 101. The complaint is the allegation made to a magistrate that a person has been guilty of some designated offense

93. SEC. 102. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.

94. SEC. 103. The following persons are magistrates: 1st. The justices of the supreme court; 2nd. The district judges; 3d. The county judges; 4th. justices of the peace; 5th. The recorders of cities; and 6th. The mayors of cities, upon whom are conferred by law the power of justices of the peace.

CHAPTER XI.

WARRANT OF ARREST.

95. SEC. 104. When a complaint is laid before a magistrate of the commission of a public offense triable within the county, he must examine on oath the complainant or prosecutor, and any witnesses he may produce, and take their depositions in writing and cause them to be subscribed by the parties making them.

96. In the absence of proof, the presumption of law is that a justice, when acting as an examining magistrate, has not transcended his jurisdiction. 1 *Parker, C. R.* 567.

97. The depositions of witnesses taken before a magistrate upon a criminal charge may be used before a grand jury. 4 *Cal.* 225.

98. A deposition taken before an examining magistrate, on the preliminary examination of a person charged with the commission of a felony, is not admissible on his trial; First, because the magistrate is not authorized or required to take it; and secondly, because taken before the defendant was held to answer. 6 *Cal.* 204, 205.

99. SEC. 105. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

100. An affidavit in pursuance of which the warrant was issued is of but little value, if it is upon information merely. An affidavit which states no fact within the knowledge

of the person making it can be of little weight in any legal proceeding. An affidavit which sets forth in positive terms as within the knowledge of the deponent the commission of the offenses charged therein, and proceeds upon information as to the names only of the persons who were guilty of the perpetration of them, is not an affidavit upon information merely. The preliminary evidence upon an application for a warrant of arrest may be either by the affidavit of some person cognizant of the facts, or by his examination under oath taken by the officer, and is for the purpose of satisfying the person to whom the application is made that there is reason to believe that a felony or other crime has been actually committed, without which no warrant should issue; as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. 1 *Cal.* 11.

101. A positive charge on oath, according to the best knowledge and belief of a party making a complaint before a justice, is sufficient to justify the issuing of the magistrate's warrant. 39 *Maine* (4 Heath) 212.

102. In a complaint against one before a justice of the peace for a larceny not triable by such magistrate, but brought before him to have the offender committed or recognized to take his trial at the proper tribunal, the offense should be stated on oath, in substance, and clearly; but the same technical precision and accuracy are not required as in an indictment. 1 *Fairf.* 473.

103. In proceedings had before a justice preliminary to the issue of a warrant for a public offense, technical accuracy is not required; it is sufficient, if giving to the language employed its usual and ordinary signification, it shows that an offense against criminal law has been committed. 25 *Ala.* 221.

104. Sec. 106. If the magistrate be satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he shall issue a warrant of arrest.

105. From the preceding statute and the decision of the courts in reference to warrants of arrest, the duty of a magistrate is plainly deducible. He must either know that an offense against the laws has been committed, or he must

be satisfied of the fact by a degree of proof which will remove a "reasonable doubt." If he has no personal knowledge respecting it, as when a crime is committed in his presence, he must require such evidence as will convince him to a moral certainty that such is a fact; nor should the guilt of the accused be less satisfactorily shown to justify his arrest. Personal character and personal liberty should not be invaded upon a mere conjecture of guilt, or upon evidence so slight as to leave the mind in a condition of "reasonable doubt." He who communicates the knowledge of a fact to another must himself possess that knowledge, or he must possess a knowledge of circumstances and facts which he is able to communicate and which the magistrate should require him to state on his oath, either in the form of an affidavit or deposition; and from the circumstances and facts so stated, the magistrate can seldom fail to judge correctly as to his duty.

106. SEC. 107. A warrant of arrest is an order in writing, in the name of the people, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

County of .....

The people of the State of California to any sheriff, constable, marshal, policeman in this state, or the county of ..... :

A complaint upon oath having been this day laid before me, by ...., that the crime of [designate it] has been committed, and accusing .... thereof, you are therefore commanded forthwith to arrest the above-named .... and bring him before me at [naming the place], or in case of my absence or inability to act, before the nearest and most accessible magistrate in this county.

Dated ....., this..... day of....., 18..

....,

Justice of ..... township.

107. The warrant of a police magistrate must show a legal authority to commit, or it is no justification of the officer who executes it. 37 *Maine* (2 Heath) 130. A warrant issued by a magistrate, founded on a statute, must show upon its face a compliance with the prerequisites of the statute. 2 *Maine* (Heath) 228.

108. Every justice of the peace in a county is a commiting magistrate; and though as a general rule, parties arrested should be taken for examination before the justice who issued the warrant; yet in case of his absence or in-

ability to act, the accused may be taken before another magistrate, and this instruction should be inserted in every warrant of arrest. 19 *Cal.* 139 (see Pr. Act 120 Post.)

109. SEC. 108. The warrant must specify the name of the defendant, or, if it be unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city or town where it is issued, and be signed by the magistrate with his name of office.

110. SEC. 109. The warrant must be directed to and executed by a peace-officer.

111. SEC. 110. Peace-officers are sheriffs of counties; and constables, marshals, and policemen of cities and towns respectively.

112. SEC. 111. If a warrant be issued by a justice of the supreme court, district judge, or county judge, it may be directed generally to any sheriff, constable, marshal, or policeman in this state, and may be executed by any of those officers to whom it may be delivered.

113. SEC. 112. If it be issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal, or policeman in the county in which it is issued, and may be executed in that county, or if the defendant be in another county it may be executed therein upon the written direction of a magistrate of that county, indorsed upon the warrant signed by him, with his name of office, and dated at the county, city or town where it is made, to the following effect: This warrant may be executed in the county of .... [or, as the case may be].

114. SEC. 113. The indorsement mentioned in the last section shall not however be made, unless the warrant be accompanied with a certificate of the county clerk under the seal of this court as to the official character of the magistrate, or unless upon the oath of a credible witness in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. Upon such proof, the magistrate indorsing the warrant shall be exempted from the liability to a civil or criminal action, though it afterwards appear that the warrant was illegally or improperly issued.

115. SEC. 114. If the offense charged in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county, as provided in section one hundred and eighteen.

116. SEC. 115. If the offense charged in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being so required by the defendant, bring him before a magistrate of such county, who shall admit the defendant to bail.

117. SEC. 116. On admitting the defendant to bail the magistrate shall certify on the warrant the fact of his having done so, and deliver the warrant and recognizance to the officer having charge of the defendant. The officer shall forthwith discharge the defendant from arrest, and shall without delay deliver the warrant and recognizance to the clerk of the court at which the defendant is required to appear.

118. SEC. 117. If on the admission of the defendant to bail, as provided in section one hundred and fifteen, or if bail be not forthwith given, the

officer shall take the defendant before the magistrate who issued the warrant or some other magistrate of the same county, as provided by the next section.

119. SEC. 118. When by the preceding sections of this chapter the defendant is required to be taken before the magistrate who issued the warrant, he may, if the magistrate be absent or unable to act, be taken before the nearest or most accessible magistrate in the same county. The officer shall, at the same time, deliver to the magistrate the warrant with his return, indorsed and subscribed by him.

120. SEC. 119. The defendant must in all cases be taken before the magistrate without unnecessary delay.

121. SEC. 120. If the defendant be brought before a magistrate in the same county other than the one who issued the warrant, the affidavits on which the warrant was granted, if the defendant insist upon an examination, shall be sent to such magistrate, or if they cannot be procured, the prosecutor and his witnesses shall be summoned to give their testimony anew.

122. SEC. 121. When a complaint is laid before a magistrate of the commission of a public offense, triable within some other county of this state, but showing that the defendant is in the county where the complaint is laid, the same proceedings shall be had as prescribed in this chapter, except that the warrant shall require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the depositions of the complainant or prosecutor, and of the witnesses who may have been produced, shall be delivered by the magistrate to the officer to whom the warrant is delivered.

123. SEC. 122. The officer who executes the warrant shall take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, and shall deliver to such magistrate the depositions and the warrant with his return indorsed thereon, and such magistrate shall proceed in the same manner as upon a warrant issued by himself.

124. SEC. 123. If the offense charged in the warrant issued pursuant to section one hundred and twenty-one be a misdemeanor, the officer shall, upon being so required by the defendant, take him before a magistrate of the county in which the said warrant is issued, who shall hold the defendant to bail, and immediately transmit the warrant, depositions, and recognizance, to the clerk of the court in which the defendant is required to appear.

CHAPTER XII.

ARREST BY AN OFFICER UNDER WARRANT.

125. SEC. 124. Arrest is the taking of a person into custody that he may be held to answer for a public offense.

126. SEC. 125. An arrest may be either: 1st, by a peace-officer under a warrant; 2d, by a peace-officer without a warrant; or, 3d, by a private person.

127. SEC. 126. Every person shall aid an officer in the execution of a warrant, if the officer require his aid, and be present and acting in its execution.

128. SEC. 127. If the offense charged be a felony, the arrest may be made on any day and at any time of the day or night. If it be a misdemeanor, the [arrest shall not be made at night unless upon the direction of the magistrate indorsed upon the warrant.

129. SEC. 128. An arrest shall be made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer.

130. SEC. 129. The defendant shall not be subjected to any more restraint than is necessary for his arrest and detention.

131. SEC. 130. The officer shall inform the defendant that he acts under the authority of the warrant, and shall also show the warrant if required.

132. SEC. 131. If after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

133. SEC. 132. The officer may break open any outer or inner door or window of a dwelling-house to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

134. SEC. 133. An officer may break open any outer or inner door or window of a dwelling-house, for the purpose of liberating a person who, having entered for the purpose of making an arrest, is detained therein, or when necessary for his own liberation.

CHAPTER XIII.

ARREST BY AN OFFICER WITHOUT A WARRANT.

135. SEC. 134. A peace-officer may, without a warrant, arrest a person: 1st. For a public offense committed or attempted in his presence; 2d, when a person arrested has committed a felony, although not in his presence; 3d, when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; 4th, on a charge made upon a reasonable cause of the commission of a felony by the party arrested.

136. SEC. 135. To make an arrest as provided in the last section, the officer may break open any outer or inner door or window of a dwelling-house if, after notice of his office and purpose, he be refused admittance.

137. SEC. 136. He may also at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterwards appear that a felony had not been committed.

138. SEC. 137. When arresting a person without a warrant the officer must inform him of his authority, and the cause of the arrest, except when he is in the actual commission of a public offense or when he is pursued immediately after an escape.

139. SEC. 138. He may take before a magistrate any person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

140. SEC. 139. When a public offense is committed in the presence of a magistrate he may, by a verbal order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

CHAPTER XIV.

ARREST BY A PRIVATE PERSON.

141. SEC. 140. A private person may arrest another: 1st, for a public offense committed or attempted in his presence; 2d, when the person arrested has committed a felony, although not in his presence; 3d, when a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

142. SEC. 141. He must before making the arrest inform the person to be arrested of the cause thereof and require him to submit, except when he is in the actual commission of the offense, or when he is arrested on pursuit immediately after its commission.

143. SEC. 142. If the person to be arrested have committed a felony, and a private person, after notice of his intention to make the arrest, be refused admittance, he may break open any outer or inner door or window of a dwelling-house for the purpose of making the arrest.

144. SEC. 143. A private person who has arrested another for the commission of a public offense must without unnecessary delay take him before a magistrate, or deliver him to a peace-officer.

CHAPTER XV.

RETAKING AFTER AN ESCAPE OR RESCUE.

145. SEC. 144. If a person arrested escape or be rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him at any time and at any place within the state.

146. SEC. 145. To retake the person escaping or rescued, the person pursuing may, after notice of his intention and refusal of admittance, break open any outer or inner door or window of a dwelling house.

CHAPTER XVI.

EXAMINATION OF THE CASE AND DISCHARGE OF THE DEFENDANT, OR HOLDING HIM TO ANSWER.

147. SEC. 146. When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate shall immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

148. SEC. 147. He shall also allow the defendant a reasonable time to

send for counsel, and adjourn the examination for that purpose, and shall, upon the request of the defendant, require a peace-officer to take a message to such counsel within the township or city as the defendant may name. The officers shall, without delay and without fee, perform that duty.

149. SEC. 148. The magistrate shall immediately after the appearance of counsel, or if defendant require the aid of counsel after waiting a reasonable time therefor, proceed to examine the case.

150. The absence of counsel for the defense, on account of sickness, is a sufficient ground of continuance in a criminal case. 4 *Cal.* 188.

151. SEC. 149. The examination must be completed at one session unless the magistrate for good cause shown adjourn it. The adjournment cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant.

152. SEC. 150. If an adjournment be had for any cause the magistrate shall commit the defendant for examination, admit him to bail or discharge him from custody upon the deposit of money as provided in this act, as security for his appearance at the time to which the examination is adjourned.

153. A justice of the peace has authority to adjourn, at his discretion, an examination of a person arrested for a bailable offense and brought before him, and may take a recognizance with sufficient sureties from the prisoner for his appearance. 4 *Day*, 98.

154. SEC. 151. The commitment for examination shall be by an indorsement signed by the magistrate on the warrant of arrest to the following effect: "The within-named ...., having been brought before me under this warrant, is committed for examination to the sheriff of ...." If the sheriff be not present, the defendant may be committed to the custody of a peace-officer.

155. SEC. 152. At the examination the magistrate shall in the first place read to the defendant the depositions of the witnesses examined on the taking of the information. He shall also issue subpenas for any witnesses required by the prosecutor or the defendant, as provided in section five hundred and forty-eight.

156. SEC. 153. The witnesses shall be examined in the presence of the defendant, and may be cross-examined in his behalf.

157. SEC. 154. When the examination of witnesses on the part of the people is closed, the magistrate shall distinctly inform the defendant that it is his right to make a statement in relation to the charges against him (stating the nature thereof), that the statement is designed to enable him, if he see fit, to answer the charge and to explain the fact alleged against him, that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial.

158. SEC. 155. If the defendant waive his right to make a statement, the magistrate shall make a note thereof immediately following the deposi-

tions of the witnesses against the defendant, but the fact of his waiver shall not be used against the defendant on the trial.

159. SEC. 156. If the defendant choose to make a statement, the magistrate shall proceed to take the same in writing without oath, and shall put to the defendant the following questions only: "What is your name and age? Where were you born? Where do you reside, and how long have you resided there? What is your business or profession? Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation."

160. SEC. 157. The answer of the defendant to each of the questions must be distinctly read to him as it is taken down. He may thereupon correct or add to his answer, and it shall be corrected until it is made conformable to what he declares to be the truth.

161. SEC. 158. The statement must be reduced to writing by the magistrate or under his direction, and authenticated in the following form: 1st. It must set forth in detail that the defendant was informed of his rights as provided by section one hundred and fifty-four, and that after being so informed he made the statement; 2d. It must contain the questions put to him and his answers thereto, as provided in sections one hundred and fifty-seven and one hundred and fifty-six; 3d. It may be signed by the defendant or he may refuse to sign it, but if he refuse to sign it his reason therefor must be stated as he gives it; 4th. It must be signed and certified by the magistrate.

162. SEC. 159. After the waiver of the defendant to make a statement, or after he has made it, his witnesses, if he produce any, shall be sworn and examined.

163. SEC. 160. The witnesses produced on the part either of the people or of the defendant shall not be present at the examination of the defendant, and while a witness is under examination the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate and to be prevented from conversing with each other until they are all examined.

164. SEC. 161. The magistrate shall also upon the request of the defendant exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officer having the defendant in custody.

165. SEC. 163. After hearing the proofs and the statement of the defendant, if he have made one, if it appear either that a public offense has not been committed, or there is no sufficient cause to believe the defendant guilty thereof, the magistrate shall order the defendant to be discharged by an indorsement on the depositions and statement signed by him to the following effect: "There being no sufficient cause to believe the within-named .... guilty of the offense within-mentioned, I order him to be discharged."

166. If on examination of a charge of suspicion of felony or of having stolen goods, the magistrate be satisfied that there is no ground for suspicion, he may dismiss the person accused. 2 *Johns.* 203.

167. SEC. 164. If, however, it appear from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate shall in like manner indorse on the deposition and statement an order signed by him to the following effect: "It appearing to me by the within depositions (and the statement if any) that the offense therein mentioned (or any other offense according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe the within A. B. guilty thereof, I order that he be held to answer to the same."

168. On an examination before a magistrate, if the evidence satisfy him that a crime different from that charged has been perpetrated, he may hold the accused in custody till an affidavit fitting the case can be made, and then recognize him upon it. 4 *Ind.* 428.

169. SEC. 165. If the offense be not bailable, the following words, or words to the same effect, shall be added to the indorsement, "and that he be committed to the sheriff of the county of ....."

170. SEC. 166. If the offense be bailable and the bail be taken by the magistrate, the following words, or words to the same effect, shall be added to the indorsement: "And I have admitted him to bail to answer by the recognizance hereto annexed."

171. SEC. 167. If the offense be bailable, and the defendant be admitted to bail, but bail have not been taken, the following words, or words to the same effect, shall be added to the indorsement mentioned in section one hundred and sixty-four: "And that he be admitted to bail in the sum of .... dollars, and be committed to the sheriff of the county of .... until he gives such bail."

172. SEC. 168. If the magistrate order the defendant to be committed as provided in sections one hundred and sixty-five and one hundred and sixty-seven, he shall make out a commitment signed by him with his name of office and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer be not present to a peace officer, who shall deliver the defendant into the proper custody, together with the commitment.

173. SEC. 169. The commitment must be to the following effect: "County of .... (as the case may be). The people of the State of California to the sheriff of the county of ....: An order having been this day made by me that A. B. be held to answer upon a charge of (stating briefly the nature of the offense, and as near as may be the time when, and the place where the same was committed), you are commanded to receive him into your custody, and detain him until he be legally discharged. Dated this .... day of ...., 18.."

174. In the form of commitment given in the one hundred and sixty-eighth section of the practice act is contained the words: "Stating briefly the nature of the offense, and as near as may be the place where the same was committed." By the "nature of the offense," is meant its

classification in the catalogue of crimes, as "assault," "assault and battery," "grand larceny," "petit larceny," etc. If, however, the magistrate is unable to classify the offense, it will be sufficient if he inserts in the commitment the acts of the accused as "no answer" upon a charge of having committed the offense of feloniously stealing, taking and carrying away, leading or driving away the personal goods or property of (the owner's name should be given) of the value of .... dollars. The time when the offense was committed should be stated, also the county in which it was perpetrated. If upon an examination it should appear that the accused is guilty of any offense, even if it be different from the one specified in the warrant of arrest, he should be committed for the offense of which he appears to be guilty. *People* vs. *Smith*, 1 Cal. 9 (*Ante* Pr. Act, 164).

175. The following commitments are defective:

State of California,
City and county of Sacramento.

Justice court; L. H. Foote, a justice of the peace, Sacramento city.

The people of the state of California to the sheriff of the city and county aforesaid: An order having been this day made by me that Michael Branigan be held to answer upon a charge of grand larceny, you are therefore commanded to receive him into your custody and detain him until he be legally discharged.

Witness my hand this second day of July, A.D, 1861.

L. H. FOOTE,
Justice of the peace.

State of California,
City and county of Sacramento.

Justice court; L. H. Foote, a justice of the peace, Sacramento city.

The people of the state of California to the sheriff of the city and county aforesaid: An order having been made by me that Mike Branigan be held to answer upon a charge of rape, you are therefore commanded to receive him into your custody and detain him until legally discharged.

Witness my hand this second day of July, A.D. 1861.

L. H. FOOTE,
Justice of the peace.

These commitments do not state the offenses charged against the prisoner with sufficient particularity. The first does not state of what property the larceny alleged was committed, or to whom the property belonged, or its value, or the time when or the place where the offense was committed. For the omission in these particulars the commitment is fatally defective. The second commitment does not state

the person upon whom the alleged rape was committed or the use of violence, which is an essential ingredient in the offense, or the time when or the place where the offense was committed. It is therefore equally defective with the first. The commitment must not only state the offense charged, but such facts as are essential to constitute the offense against the prisoner. Such was the rule of the common law according to the most approved authorities, and such is the requirement of the statute in this state. The statute provides that the commitment shall state "briefly the nature of the offense, and as near as may be the time when and the place where the same was committed;" and gives the form of a commitment which can be readily followed by magistrates. There is no excuse for the issuance of process so defective as the commitments under consideration. 19 *Cal.* 135.

176. SEC. 170. On holding the defendant to answer, the magistrate shall take from each of the material witnesses examined before him on the part of the people a written recognizance to the effect that he will appear and testify at the court to which the depositions and statements are to be sent, or that he will forfeit the sum of five hundred dollars.

177. SEC. 171. At any time before or after the defendant has been held to answer, if the magistrate or the district or county judge before whom the case may be pending should become satisfied, by proof on oath, that there is reason to believe that any such witness will not fulfill his recognizances to appear and testify unless security be required, said magistrate or judge may order the witness to enter into a written recognizance, with such sureties and in such sum as he may deem meet, for his appearance as specified in the last section.

178. SEC. 172. Infants and married women, who are material witnesses against the defendant, may in like manner be required to procure sureties for their appearance, as provided in the last section.

179. SEC. 173. If a witness required to enter into recognizance to appear and testify either with or without sureties refuse compliance with the order for that purpose, the magistrate shall commit him to prison until he comply or be legally discharged.

180. SEC. 174. When, however, it shall satisfactorily appear by examination on oath of the witness or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people; such examination shall be by question and answer, and shall be conducted in the same manner as the examination before a committing magistrate is required by this act to be conducted, and the witness shall thereupon be discharged.

181. SEC. 175. The last section shall not apply to the prosecutor or to an accomplice in the commission of the offense charged.

182. SEC. 176. When a magistrate has discharged a defendant, or has

held him to answer as provided in sections one hundred and sixty-four and one hundred and sixty-five, he shall return without delay to the clerk of the court at which the defendant is required to appear, the warrant if any, th depositions, the statement of the defendant, if he have made one, and all recognizance of bail or for the appearance of witnesses taken by him.

CHAPTER XVII.

OF PROCEEDINGS AFTER COMMITMENT AND BEFORE INDICTMENT.

183. All public offenses triable in the district court and county court must be prosecuted by indictment, except as provided in the next section.

184. SEC. 178. When the proceedings are had for the removal of district county or township officers, they may be commenced by an accusation in writing, as provided in sections seventy and eighty-three.

185. SEC. 179. All accusations against district, county and township officers, and all indictments, must be found in the county court.

CHAPTER XVIII.

POWERS AND DUTIES OF A GRAND JURY.

186. From the laws concerning the "powers and duties of a grand jury" the following sections are selected, because they alone can be construed as, by possibility, creating a case within the jurisdiction of justices of the peace. A grand jury may present to the court an offense triable by a justice, and a member of a grand jury may be called into a justice's court to disclose testimony given by a witness before them.

187. SEC. 207. A presentment is an informal statement in writing by the grand jury, representing to the court that a public offense has been committed which is triable within the county, and that there is reasonable ground for believing that a particular individual named or described has committed it.

188. SEC. 218. A member of the grand jury may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against him for perjury in giving his testimony or upon his trial therefor.

189. SEC. 219. No grand juror shall be questioned for anything he may say or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty in making an accusation or giving testimony to his fellow-jurors.

CHAPTER XIX.

PRESENTMENT AND PROCEEDINGS THEREON.

190. SEC. 222. No grand juror, district attorney, clerk, judge or other officer, shall disclose the fact of a presentment having been made for a felony until the defendant shall have been arrested. But this prohibition shall not extend to disclosure by the issuing or in the execution of a warrant to arrest the defendant.

191. SEC. 223. A violation of the provisions of the last section shall be punished as a contempt and as a misdemeanor.

192. SEC. 224. If the court deem that the facts stated in the presentmen constitute a public offense, triable within the county, it shall direct the clerk to issue a bench warrant for the arrest of the defendant.

193. SEC. 225. The clerk, on the application of the district attorney, may accordingly, at any time after the order, whether the court be sitting or not, issue a bench warrant under his signature and the seal of the court into one or more counties.

194. SEC. 226. The bench warrant upon presentment shall be substantially in the following form:

County of ..... The people of the State of California, to any sheriff, constable, marshal or policeman, in this state:

A presentment having been made on the .... day of ...., 18.., to the county court of the county of ...., charging .... with the crime of .... [designating it generally]; you are therefore commanded forthwith to arrest the above-named ...., and take him before ...., a magistrate of this county; or, in case of his absence or inability to act, before the nearest or most accessible magistrate in this county.

Given under my hand, with the seal of said court affixed, this .... day of ...., A.D. 18..

By order of said court,

[L.S.] ...., clerk.

195. SEC. 227. The bench warrant may be served in any county, and the officer serving it shall proceed thereon in all respects as upon a warrant of arrest on a complaint, except that when served in another county it need not be indorsed by a magistrate of that county.

196. SEC. 228. The magistrate, when the defendant is brought before him shall proceed to examine the charges contained in the presentment, and hold the defendant to answer the same or discharge him therefrom, in the same manner in all respects as upon a warrant of arrest on complaint.

CHAPTER XX.

FORM OF INDICTMENT.

The selection of the following sections have been made, because by using the word "complaint" wherever the word "indictment" occurs, it will be seen that they are applicable to justices' courts.

197. SEC. 254. Upon an indictment against several defendants, any one or more may be convicted or acquitted.

198. SEC. 255. No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degrees in cases of felony, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals.

199. SEC. 256. An accessory after the fact to a commission of a felony, may be indicted and punished, though the principal felon may be neither tried nor indicted.

200. SEC. 257. A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another or a gratuity or a reward or an agreement or understanding express or implied to compound or conceal the offense, or to abstain from a prosecution therefor or to withhold any evidence thereof, though the persons guilty of the original offense have not been indicted or tried.

CHAPTER XXI.

CHALLENGING THE JURY.

201. SEC. 326. A challenge is an objection made to the trial jurors, and is of two kinds: 1st. To the panel; 2d. To an individual juror.

202. SEC. 327. When several defendants are tried together, they are not allowed to sever their challenges, but must join therein.

203. SEC. 328. The panel is a list of jurors returned by a sheriff to serve at a particular court or for the trial of a particular cause.

204. SEC. 329. A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party.

205. SEC. 330. A challenge to the panel can only be founded on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury, or an intentional omission of the sheriff to summon one or more of the jurors drawn.

206. SEC. 331. A challenge to a panel must be taken before a juror is sworn, and must be in writing, specifying plainly and distinctly the facts constituting the grounds of challenge.

207. SEC. 332. If the sufficiency of the facts alleged as a ground of chal-

lenge be determined, the adverse party may except to the challenge. The exception need not be in writing, but shall be entered on the minutes of the court.

208. SEC. 333. Upon the exception, the court shall proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

209. SEC. 334. If on the exception the court deem the challenge sufficient it may, if justice require it, permit the party excepting to withdraw his exception and to deny the facts alleged in the challenge. If the exception be allowed the court may in like manner permit an amendment of the challenge.

210. SEC. 335. If the challenge be denied, the denial in like manner may be oral, and shall be entered on the minutes of the court, and the court shall proceed to try the question of fact.

211. SEC. 336. Upon such trial, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the grounds of challenge.

212. SEC. 337. When the panel is formed from persons whose names are not drawn from the grand jury box, a challenge may be made to the panel on account of any bias of the officer who summoned the jury, which would be good ground of challenge to a juror. Such objection shall be made in the same form and determined in the same manner as when made to a juror.

213. SEC. 338. If, either upon an exception to the challenge or a denial of the fact, the challenge be allowed, the court shall discharge the jury so far as the trial of the indictment in question is concerned. If it be disallowed, the court shall direct the jury to be empaneled.

214. SEC. 339. Before a juror is called, the defendant must be informed by the court or under its direction, that if he intend to challenge any individual juror he must do so when the juror appears and before he is sworn.

215. SEC. 340. A challenge to an individual juror is either: 1st. Peremptory; 2d. For cause.

216. SEC. 341. It must be taken when the juror appears and before he is sworn, but the court may for good cause permit it to be taken after the juror is sworn and before the jury is completed.

217. SEC. 342. A peremptory challenge may be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.

218. Peremptory challenges are interposed at the option of the defense or the prosecution, and each defendant has a right to insist that the limit allowed to the prosecution is not exceeded, and that he shall not be deprived of the judgment of a competent and impartial juror by the mere whim or caprice of his co-defendant. 8 *Cal.* 303.

219. SEC. 343. If the offense charged be punishable with death, or with imprisonment in a state prison for life, the defendant shall be entitled to ten and the state to five peremptory challenges; on a trial for any other offense, the defendant shall be entitled to five and the state to three peremptory challenges.

220. Sec. 344. A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either: 1st. General, that the juror is disqualified from serving in any case; 2d. Particular, that he is disqualified from serving in the cause on trial.

221. Challenges for cause may be made by any party, and when a fact establishing the incompetence of a juror is brought to the knowledge of the court, it becomes its duty to exclude him even against the wishes of all the parties. 8 *Cal.* 303.

222. A party on trial is entitled to a lawful jury, but is not entitled as a matter of absolute right to have the first juror who is called and possesses all the statutory qualifications sit in his case. 32 *Cal.* 40.

223. Nor is the objection well taken to the panel of a trial jury, on the ground that such jury were summoned by order of the court after the commencement of the term. 10 *Cal.* 50.

224. Sec. 345. General causes of challenge are: 1st. A conviction for felony; 2d. A want of any of the qualifications prescribed by statute to render a person a competent juror; 3d. Unsoundness of mind or such defect in the faculties of the mind or the organs of the body as renders him incapable of, performing the duties of a juror.

225. Sec. 346. Particular causes of challenge are of two kinds: 1st. For such a bias as when the existence of the facts is ascertained in judgment of law disqualifies the juror and which is known in this act as implied bias; 2d. For the existence of a state of mind on the part of the juror in reference to the case which, in the exercise of a sound discretion on the part of trier, leads to the inference that he will not act with entire impartiality, and which is known in this act as actual bias.

226. Sec. 347. A challenge for implied bias may be taken for all or any of the following causes, and for no other: 1st. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted or to the defendant; 2d. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages; 3d. Being a party adverse to the defendant in a civil action or having complained against or been accused by him in a criminal prosecution; 4th. Having served on the grand jury which found the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment; 5th. Having served on a trial jury which has tried another person for the offense charged in the indictment; 6th. Having been one of a jury formerly sworn to try the same indictment and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it; 7th. Having served as a juror in a civil

action brought against the defendant for the act charged as an offense; 8th. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged; 9th. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror.

227. The defendant in a criminal case has a right to question the jurors whether they have formed or expressed an opinion relative to the guilt or innocence of the accused without first challenging them for cause, and it is error to compel him to do so. 5 *Cal.* 277.

228. A challenge for implied bias in criminal cases must specify the particular cause of bias. It is not enough to say, "I challenge the juror for implied bias." 16 *Cal.* 128; 6 *Cal.* 206; 24 *Cal.* 17; 27 *Cal.* 507; 18 *Cal.* 180.

229. When a juror is challenged for actual bias the triers are to determine the fact from the testimony, and any testimony which would lead to the conclusion that a bias existed in the juror's mind is competent testimony. 5 *Cal.* 347.

230. To ascertain whether a bias exists in the mind of the juror, resort must be had to his declarations to others or to his sworn statements when interrogated. As the juror best knows the condition of his own mind no satisfactory conclusion can be arrived at without resort to himself. 5 *Cal.* 349.

231. The intention of the legislature was to exclude from the jury-box every one who had formed an unqualified opinion, or having formed an opinion had expressed it without qualification. 6 *Cal.* 228.

232. An objection to the competency of a juror can be taken after verdict. 9 *Cal.* 309, (in a criminal case).

233. The competency of a juror must be determined by the court and not by the juror. 29 *Cal.* 635.

234. SEC. 348. An exemption from service on a jury is not a cause for challenge, but the privilege of the person exempted.

235. SEC. 349. In a challenge for implied bias, one or more of the causes stated in section three hundred and forty-seven must be alleged. In a challenge for actual bias, it must be alleged that the juror is biased against the party challenging. In either case the challenge may be oral, but must be entered on the minutes of the court.

236. SEC. 350. The adverse party may except to the challenge in the

same manner as to a challenge to the panel, and the same proceedings shall be had thereon as prescribed in sections three hundred and thirty-two and three hundred and thirty-three, except that if the exception be allowed, the juror shall be excluded. He may orally deny the facts alleged as the ground of challenge.

237. SEC. 351. If the facts be denied the challenge shall be tried as follows: 1st. If it be for implied bias, by the court; 2d. If it be for actual bias, by triers.

238. SEC. 354. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge and shall be compelled to answer every question pertinent to the inquiry therein.

239. SEC. 355. Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge.

240. SEC. 356. On the trial of the challenge for an implied bias the court shall determine the law and the facts, and shall either allow or disallow the challenge and direct an entry accordingly on the minutes.

241. SEC. 358. The triers must thereupon find the challenge either true or not true, and the decision is final. If they find it true the juror shall be excluded.

242. SEC. 359. All challenges to an individual juror except peremptory must be taken first by the defendant and then by the people, and each party must exhaust all his challenges to each juror as he is called before the other begins.

243. SEC. 360. The challenges of either party need not all be taken at once, but they must be taken separately in the following order, including in each challenge all the causes of challenge belonging to the same class: 1st. To the panel. 2d. To an individual juror for a general disqualification. 3d. To an individual juror for an implied bias. 4th. To an individual juror for an actual bias.

244. SEC. 361. If all the challenges on both sides be disallowed, either party may still take a peremptory challenge, unless the peremptory challenges be exhausted.

CHAPTER XXII.

APPEALS, WHEN ALLOWED, AND HOW TAKEN.

245. SEC. 481. The party aggrieved in a criminal action, whether that party be the people or the defendant, may appeal as follows: 1st. To the county court, from a final judgment of a justice's, recorder's, or other inferior municipal court; 2d. To the supreme court, from a final judgment of the district court, or county court, in all criminal cases amounting to a felony, on questions of law alone; also, from an order of the district court, or county court, granting or refusing a new trial, or which affects a substantial right in a criminal case amounting to a felony, on questions of law alone.

246. An appeal does not lie to the county court from an order made by a justice of the peace, directing property alleged to have been stolen and discovered and brought before the justice by a peace-officer, by virtue of a search warrant issued by the justice, to be delivered to the owner. 26 *Cal.* 651.

247. SEC. 482. The appeal to the supreme court can be taken on questions of law alone. The appeal to the county court can be taken on both questions of law and fact. (Does not apply to the police court of San Francisco.)

248. SEC. 483. The party appealing shall be known as the appellant and the adverse party as the respondent.

249. SEC. 484. Upon the appeal, any decision of the court in an intermediate order or proceeding forming a part of the record may be revised.

250. SEC. 485. An appeal must be taken within one year after the judgment was rendered.

251. SEC. 486. An appeal must be taken by the service of a notice in writing on the clerk of the court in which the action was tried, stating that appellant appeals from the judgment.

252. SEC. 487. If the appeal be taken by the defendant, a similar notice must be served on the district attorney of the county in which the judgment was rendered.

253. SEC. 488. If it be taken by the people, a similar notice must be served upon the defendant if he be a resident of the county, or if not on the counsel, if any, who appeared for him on trial, if he be living within the county. If such service, after due diligence, cannot be made, the appellate court, upon proof thereof, shall make an order for the publication of due notice in some newspaper, and for such time as it may deem proper.

254. The following is a form of notice of appeal:

In the justice's court of the.... township, of the county of ...., state of ....

....,
plaintiff,
against
....,
defendant.

You will please take notice that the ..... in the above-entitled action hereby appeal to the county court of the .... county of .... from the judgment therein made and entered in the said justice's court, on the .... day of ...., A.D. 18.., against said defendant and from the whole of said judgment. This appeal is taken on questions of both law and fact [or, upon questions of law, as the case may be].

Dated ....., A.D. 18..

Yours, etc.,

....,
Attorney for appellant.

To the justice of said justice's court, and .... esq.,
Attorney for respondent.

255. If notice of appeal is given from an order of a justice directing stolen property to be delivered to the alleged owner, the county court has no jurisdiction to compel, by writ of mandate, the justice to send up the papers. 26 *Cal.* 651.

256. SEC. 489. At the expiration of the time appointed for the publication, on filing an affidavit of the publication, the appeal shall be deemed perfected.

257. SEC. 490. An appeal taken by the people shall in no case stay or affect the operation of a judgment in favor of the defendant, until judgment is reversed.

258. SEC. 491. No appeal from a judgment of conviction, unless it be one imposing a fine only, shall stay the execution of the judgment, but the defendant, if in custody, shall remain in custody to abide the judgment upon the appeal, unless admitted to bail, as prescribed in section five hundred and fourteen.

259. SEC. 492. Upon the appeal being taken, the clerk with whom the notice of appeal is filed, must within ten days thereafter, without charge, transmit to the clerk of the supreme court a copy of the notice of appeal and of the record, and upon the receipt of the record it shall be the duty of the clerk of the supreme court to file said record, and perform the same service as in civil cases, without demanding his fees therefor; said fees, in case of a reversal of the judgment and ultimate acquittal of the defendant, to be a charge against the state, and in case of an affirmance of the judgment appealed from to be a charge against the defendant, and collected in the same manner as judgment in civil cases; provided, however, that in case of the insolvency of the defendant, and his inability to pay said costs, then and in that event they shall become a charge against the state.

260. *Jurisdiction.*—The supreme court has no jurisdiction on appeal in a criminal action where the offense charged is less than a felony. 30 *Cal.* 98; 5 *Cal.* 295; 31 *Cal.* 565.

261. On an appeal from a magistrate's court, or of the police court of the city and county of San Francisco, to the county court, in criminal cases, a statement is unnecessary if the pleadings and docket of the magistrate show the error relied on. 26 *Cal.* 635.

Statement on Appeal in Criminal Case.—In a criminal case, wherever the alleged error appears upon the face of the complaint, or in the record of the justice, or upon the face of the proceedings before the justice, a statement is unnecessary on an appeal to the county court. 37 *Cal.* 454.

262. *Appeal from Police Court of San Francisco.*—An

appeal from a judgment of the police judge's court of the city of San Francisco to the county court can only be heard by a trial *de novo* in the county court. 26 *Cal.* 635.

263. SEC. 502. If a judgment against the defendant be reversed, without ordering a new trial, the appellate court shall direct, if he be in custody, that he be discharged therefrom, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to the defendant.

264. SEC. 503. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the appellate court may direct.

265. SEC. 506. After the certificate of judgment has been remitted, as provided in section five hundred and fourth, the appellate court shall have no further jurisdiction of the appeal or of the proceedings thereon, and all orders which may be necessary to carry the judgment into effect shall be made by the court to which the certificate is remitted.

CHAPTER XXIII.

IN WHAT CASES THE DEFENDANT MAY BE ADMITTED TO BAIL.

266. SEC. 507. Admission to bail is the order of a competent court or magistrate, that the defendant be discharged from actual custody upon the taking of bail.

267. SEC. 508. The taking of bail consists in the acceptance by a competent court or magistrate, of the recognizance of sufficient bail for the appearance of the defendant, according to the terms of the recognizance, or that the bail will pay to the people of this state a specified sum.

268. SEC. 509. A person charged with an offense may be admitted to bail before conviction, as a matter of right, in all cases except as specified in section five hundred and ten.

269. SEC. 510. No person shall be admitted to bail where he is charged with an offense punishable with death, when the proof is evident or the presumption great.

270. SEC. 511. When the admission to bail is a matter of discretion, the court or officer by whom it may be ordered, shall require such notice of the application therefor as he may deem reasonable to be given to the district attorney of the county where the examination is had.

271. SEC. 512. After the conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail: 1st, As a matter of right where the appeal is from a judgment imposing a fine only; 2d, A matter of discretion in all other cases.

272. SEC. 513. Before conviction a defendant may be admitted to bail: 1st, For his appearance before the magistrate, on the examination of the charge before being held to answer; 2d, To appear at the court to which the

magistrate is required by section one hundred and seventy-six, to return the depositions and statement upon the defendant being held to answer after examination; 3d, After indictment, either before the bench warrant issued for his arrest, or upon any order of the court committing or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment in the court in which it is found, or to which it may be sent or removed for trial.

273. SEC. 514. After conviction and upon an appeal the defendant may be admitted to bail as follows: 1st, If the appeal be from a judgment imposing a fine only on the recognizance of bail that he will pay the same or such part of it as the appellate court may direct, if the judgment be affirmed or modified or the appeal be dismissed; 2d, If judgment of imprisonment have been given that he will surrender himself in execution of the judgment, upon its being confirmed or modified or upon the appeal being dismissed.

People vs. *Cabannes et al.*—This is an action upon a paper purporting to be an appeal bond in a criminal case. The criminal practice act does not require a bond on appeal, and we regard the paper in question as of no force or effect. The provisions relied on to sustain it are those relating to bail, but an examination of these provisions will show that it is ineffectual as a bail bond. The case was tried before a justice of the peace, and a judgment rendered imposing a fine, and in default of payment imprisonment in the county jail. The bond recites a money judgment and binds the sureties for its payment, setting forth substantially the conditions required in an undertaking on appeal to the county court in civil cases. Section 514 of the act referred to provides that "After conviction and upon an appeal, the defendant may be admitted to bail as follows: 1st, If the appeal be from a judgment imposing a fine only on the recognizance of bail, that he will pay the same, or such part of it as the appellate court may direct, if the judgment be affirmed or modified, or the appeal be be dismissed; 2d, If judgment of imprisonment have been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified or upon the appeal being dismissed." This section prescribes the terms to be complied with in giving bail, and it is obvious that the second subdivision is the one to be considered in determining the effect of the bond. The justice seems to have regarded the judgment as imposing a fine only, and the counsel for the people contends that this is the proper

view to take of it. It is plain, however, that the imprisonment is as much a part of the judgment as the fine, and to be relieved from that an obligation to pay the fine was not necessary. In taking the bond, the justice has exacted a security which the statute does not require, and such being the case, we are of opinion that no liability resulted from its execution. 20 *Cal.* 528, 529.

CHAPTER XXIV.

BAIL—UPON BEING HELD TO ANSWER BEFORE INDICTMENT.

275. SEC. 515. When the defendant has been held to answer as provided in section one hundred and sixty-four, the admission to bail may be by the magistrate by whom he is so held or by any magistrate who has the power to issue the writ of *habeas corpus*.

276. SEC. 516. Bail is put in by a written recognizance executed by two sufficient sureties [with or without the defendant, in the discretion of the court or magistrate], and acknowledged before the court or magistrate in substantially the following form: "An order having been made on the .... day of ...., A.D. 18.., by ...., a justice of the peace of .... county [or as the case may be], that ...., held to answer upon a charge of [stating briefly the nature of the offense], upon which he has been duly admitted to bail in the sum of .... dollars; We..... and .... [stating their place of residence], hereby undertake that the above .... shall appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times hold himself amenable to the orders and process of the court, and if convicted shall appear for judgment and render himself in execution thereof, or if he fail to perform either of these conditions that he will pay to the people of the state of California, the sum of .... dollars [inserting the sum in which the defendant is admitted to bail].

277. SEC. 517. The qualifications of bail are as follows: 1st. Each of them must be a resident and a householder or freeholder within the state; but the court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered. 2d. They must each be worth the amount specified in the recognizance, exclusive of property exempt from execution; but the court or magistrate on taking bail, may allow more than two bail to justify severally in amounts less than that expressed in the recognizance, if the whole justification be equivalent to that of sufficient bail.

278. SEC. 518. The bail shall in all cases justify by affidavit taken before the court or magistrate, as the case may be. The affidavit must state that they each possess the qualifications provided in section five hundred and seventeen.

279. SEC. 519. The court or magistrate may thereupon further examine the bail upon oath concerning their sufficiency in such manner as the court or magistrate may deem proper.

280. Under our practice, bail is taken by a recognizance executed by sureties, and the accused need not sign it; and upon forfeiture, the proceedings on the recognizance can only be by action against the sureties. 19 *Cal.* 576; 19 *Cal.* 539.

CHAPTER XXV.

BAIL UPON INDICTMENT BEFORE CONVICTION.

281. SEC. 520. When the offense charged in the indictment is not capital the officer serving the bench warrant shall, if required, take the defendant before a magistrate in the county in which it is issued or in which he is arrested for the purpose of giving bail as prescribed in sections two hundred and sixty-fifth and two hundred and sixty-eighth.

282. SEC. 523. The bail must be put in by a written recognizance, executed by two sufficient sureties [with or without the defendant, in the discretion of the court or magistrate], and acknowledged before the court or magistrate in substantially the following form. "An indictment having been found on the .... day of ...., A.D. 18.., in the county court of the county of ...., charging .... with the crime of .... [designating it generally], and he having been duly admitted to bail in the sum of .... dollars, we, ... and ...., of .... [stating their place of residence], hereby undertake that the above named .... shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and processes of the court, and if convicted shall appear for judgment and render himself in execution thereof; or, if he fail to perform either of these conditions, that we will pay to the people of the state of California the sum of .... dollars [inserting the sum in which the defendant is admitted to bail]."

283. SEC. 524. The provisions contained in section five hundred and seventeenth to five hundred and nineteenth, both inclusive, in relation to bail, shall apply to the qualifications of the bail and to all the proceedings respecting the putting in and justifying of bail and incident thereto.

284. The following is a form of justification:

State of ....., }
county of ..... } ss.

.... and ...., the sureties in the within-named undertaking being duly sworn, say each for himself, and not one for the other, that he is worth the sum of .... dollars, over and above all his debts and liabilities, exclusive of property exempt from execution, and that he is a resident of said county, and a freeholder or householder therein.

....,
....,

Subscribed and sworn to before me this .... day of ...., 18..

....,
Justice of the peace in and for said county.

CHAPTER XXVI.

BAIL ON APPEAL.

285. SEC. 525. In the cases in which the defendant may be admitted to bail upon appeal, as provided in section five hundred and twelfth, the order admitting him to bail may be made by any magistrate having the power to issue a writ of *habeas corpus*.

286. SEC. 526. When the admission to bail is a matter of discretion, the court or officer by whom it may be ordered, shall require such notice of the application therefor as he may deem reasonable to be given to the district attorney of the county in which the verdict or judgment was originally rendered.

287. SEC. 527. The bail must possess the qualifications and must be put in all respects as above provided, except that the condition of the recognizance shall be to the effect that the defendant will in all respects abide the orders and judgment of the appellate court upon the appeal.

288. The following is a form of criminal appeal bond:

In the justice's court of .... township, in the county of ...., state of ....
Before .... esq., justice of the peace.

Know all men by these presents, that we, ... as principal, and .... and ...., as sureties, are held and firmly bound unto the people of the state of California, in the full sum of .... dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals, this .... day of ...., A.D. 18..

The condition of the above undertaking is such that whereas the said .... was, on the .... day of ...., A.D. 18.., before ...., esq., a justice of the peace in and for the county of ...., duly convicted of the crime of ...., and upon said conviction it was ordered, adjudged and decreed by the said justice that the said .... pay a fine, the sum of .... dollars, and that said ..... be imprisoned in the county jail in and for the said county of...., till said fine be paid, the said term of imprisonment not to exceed.... And whereas, the said .... is desirous of appealing from the decision and judgment of said justice to the county court in and for the .... county of ....

Now, therefore, if the said judgment shall be affirmed or modified, or the appeal be dismissed by the said county court and the said .... shall well and truly pay, or cause to be paid, the fine aforesaid, the sum of .... dollars, or such part of said fine as the said county court may direct, together with all costs in this cause that may have accrued in the said county court as well as in the said justice's court, and shall obey any and all orders

the said county court may make therein, then this obligation to be null and void and of no effect, otherwise to be and remain in full force and virtue.

...., [L.S.]
...., [L.S.]
...., [L.S.]

Witnessed and approved by me this .... day of ...., A.D. 18..

...., [L.S.]
Justice of the peace in and for said county.

[See justification of sureties, 284.]

CHAPTER XXVII.

DEPOSIT INSTEAD OF BAIL.

289. SEC. 528. The defendant at any time after an order admitting him to bail, instead of giving bail may deposit with the clerk of the court in which he is held to answer, the sum mentioned in the order, and upon delivering to the officer in whose custody he is a certificate of the deposit he shall be discharged from custody.

290. SEC. 529. If the defendant have given bail, he may at any time before the forfeiture of the recognizance in like manner deposit the sum mentioned in the recognizance, and upon the deposit being made the bail shall be exonerated.

291. SEC. 530. When money has been deposited, if it remain on deposit at the time of a judgment for the payment of a fine, the county clerk shall, under the direction of the court, apply the money in satisfaction thereof, and after satisfying the fine and costs shall refund the surplus, if any, to the defendant.

CHAPTER XXVIII.

SURRENDER OF THE DEFENDANT.

292. SEC. 531. At any time before the forfeiture of their recognizance, the bail may surrender the defendant in their exoneration or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner:

293. SEC. 532. A certified copy of the recognizance of bail shall be delivered to the officer who shall detain the defendant in his custody thereon as upon a commitment, and shall by a certificate in writing acknowledge the surrender.

2d. Upon the recognizance and a certificate of the officer the court in which the action is pending may, upon notice of five days to the district attorney of the county with a copy of the recognizance and certificate, order that the bail be exonerated, and on filing the orders and the papers used on the application they shall be exonerated accordingly.

294. SEC. 533. For the purpose of surrendering the defendant, the bail at any time before they are discharged, and at any place within the state, may themselves arrest him, or by a written authority indorsed on a certified copy of the recognizance may empower any person of suitable age and discretion to do so.

295. SEC. 534. If money have been deposited instead of bail and the defendant at any time before the forfeiture thereof shall surrender himself to the officer to whom the commitment was directed in the manner provided in the last two sections, the court shall order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the district attorney with a copy of the certificate.

CHAPTER XXIX.

FORFEITURE OF THE RECOGNIZANCE, OR OF THE DEPOSIT OF MONEY.

296. SEC. 535. If without sufficient excuse the defendant neglect to appear for arraignment or for trial or judgment, or upon any other occasion, when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court shall direct the fact to be entered upon its minutes, and the recognizance or the money deposited instead of bail, as the case may be, shall thereupon be declared forfeited.

297. SEC. 536. If at any time before the final adjournment of the court the defendant appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the recognizance or the deposit to be discharged upon such terms as may be just.

298. SEC. 537. If the forfeiture be not discharged as provided in the last section, the district attorney may at any time after the adjournment of the court proceed by action only against the bail upon their recognizance.

299. SEC. 538. If by reason of the neglect of the defendant to appear, as provided in section five hundred and thirty-fifth, money deposited instead of bail is forfeited, and the forfeiture be not discharged or remitted, as provided in section five hundred and thirty-sixth, the clerk with whom it is deposited shall immediately after the final adjournment of the court pay over the money deposited to the county treasurer.

CHAPTER XXX.

RECOMMITMENT OF THE DEFENDANT AFTER HAVING GIVEN BAIL.

300. SEC. 539. The court to which the committing magistrate shall return the depositions and statement, or in which an indictment or an appeal is pending, or to which a judgment on appeal is remitted to be carried into

effect, may, by an order to be entered on its minutes, direct the arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged in the following cases: 1st, When by reason of his failure to appear he has incurred a forfeiture of his bail or of money deposited instead thereof, as provided in section five hundred and thirty-fifth; 2d, When it satisfactorily appears to the court that his bail or either of them are dead or insufficient, or have removed from the state; 3d, Upon an indictment being found in the cases provided in section two hundred and sixty-ninth.

301. SEC. 540. The order for the recommitment of the defendant shall recite generally the facts upon which it is founded, and shall direct that the defendant be arrested by any sheriff, constable, marshal or policeman within this state, and committed to the custody of the sheriff of the county where the depositions and statement were returned, or the indictment was found, or the conviction was had, as the case may be, to be detained until legally discharged.

SEC. 541. The defendant may be arrested pursuant to the order, upon a certified copy thereof in any county in the same manner as upon a warrant of arrest, except that when arrested in another county the order need not be indorsed by a magistrate of that county.

302. SEC. 542. If the order recite as the grounds upon which it is made the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.

303. SEC. 543. If the order be made for any other cause, and the offense be bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum affixed, which shall be specified in the order.

304. SEC. 544. When the defendant is admitted to bail, the bail may be taken by any magistrate in the county having authority in a similar case to admit to bail upon the holding the defendant to answer before an indictment, as prescribed in section five hundred and fifteenth, or by any other magistrate to be designated by the court.

305. SEC. 545. When bail is taken upon the recommitment of the defendant, the recognizance shall be in substantially the following form:

An order having been made on the .... day of ...., A.D. 18.., by the court [naming it], that .... be admitted to bail in the sum of .... dollars, in an action pending in that court against him in behalf of the people of the State of California upon an ["information, presentment, indictment or appeal," as the case may be]; we, ... and ...., of [stating their places of residence], hereby undertake that the above-named .... shall appear in that or any other court in which his appearance may be lawfully required upon that ["information, presentment, indictment or appeal," as the case may be]; and shall at all times render himself amenable to its orders and processes, and appear for judgment and surrender himself in execution thereof, or if he fail to perform either of these conditions, that he will pay to the people of the State of California the sum of .... dollars, [insert the sum in which the defendant is admitted to bail].

306. SEC. 546. The bail must possess the qualifications, and must be put in, in all respects, in the manner heretofore prescribed.

CHAPTER XXXI.

COMPELLING THE ATTENDANCE OF WITNESSES.

307. SEC. 547. The process by which the attendance of a witness before a court or magistrate is required is a subpena.

308. SEC. 548. A magistrate before whom an information is laid may issue subpenas subscribed by him for witnesses within the state, either on behalf of the people or of the defendant.

309. SEC. 552. A subpena authorized by the last four sections shall be substantially in the following form: The people of the state of California to ... . You are commanded to appear before ...., a justice of the peace of .... township, in .... county [or as the case may be], at [naming the place], on [stating the day and hour] as a witness in a criminal action, prosecuted by the people of the state of California, against .... Given under my hand, this .... day of ...., A.D. 18... ...., justice of the peace [or ".... ...., district attorney," or "by order of the court, ..., clerk," as the case may be].

310. SEC. 553. If books, papers or documents, be required, a direction to the following effect shall be contained in the subpena: And you are required to bring with you the following [describing intelligibly the books, papers or documents required).

311. SEC. 554. A peace-officer must serve within his county any subpena delivered to him for service, either on the part of the people or of the defendant, and must make a written return of the service, subscribed by him, stating the time and place of service without delay.

312. SEC. 555. The service of a subpena shall be by showing the original to the witness personally and informing him of the contents.

SEC. 556. When a person shall attend before a magistrate, grand jury or court, as a witness on behalf of the people, upon a subpena or by virtue of a recognizance, and it shall appear that he has come from any place out of the county or that he is poor, the court, if the attendance of the witness be upon a trial by an order upon its minutes, or in any other case the county judge by an order subscribed by him, may direct the treasurer of the county to pay the witness a reasonable sum to be specified in the order for his expenses.

313. SEC. 557. Upon the production of the order or a certified copy thereof, the county treasurer shall pay the witness the sum specified therein out of the county treasury.

314. SEC. 558. No person shall be obliged to attend as a witness before any court or judge out of the county where the witness resides or is served with the subpena, unless a judge of the court in which the offense is triable, or a justice of the supreme court or a county judge, upon an affidavit of the district attorney or prosecutor of the defendant or his counsel, stating that he believes the evidence of the witness is material and his attendance at the examination or trial necessary, shall indorse on the subpena an order for the attendance of the witness.

315. SEC. 559. Disobedience to a subpena or a refusal to be sworn or to

answer as a witness may be punished by the court or magistrate as a contempt.

316. SEC. 560. Where a witness has entered into a recognizance to appear, as provided in section one hundred and seventieth, upon his failure to do so his recognizance shall be forfeited in the same manner as recognizances of bail.

317. SEC. 561. A witness disobeying a subpena issued on the part of the defendant, shall also forfeit to the defendant the sum of one hundred dollars, which may be recovered in a civil action unless good cause can be shown for his non-attendance.

CHAPTER XXXII.

INQUIRY INTO THE INSANITY OF THE DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

318. SEC. 583. An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment or punished for a public offense, while he is insane.

CHAPTER XXXIII.

ENTITLING AFFIDAVITS.

319. SEC. 600. It shall not be necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment or upon an appeal; but if made without a title or with an erroneous title, it shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment or appeal, in which it is made.

CHAPTER XXXIV.

ERRORS AND MISTAKES IN PLEADINGS AND OTHER PROCEEDINGS.

320. SEC. 601. Neither a departure from the form or mode prescribed by this act in respect to any pleadings or proceedings, nor an error or mistake therein shall render the same invalid, unless it have actually prejudiced the defendant, or tendered to his prejudice in respect to a substantial right.

321. Abstract and immaterial error in insufficient to reverse a judgment, but when error is shown, the burden of showing its immateriality rests upon the party in whose favor it was committed. 17 *Cal.* 176.

322. In criminal cases courts have no power to affirm a judgment merely because the judges think upon the merits the judgment is right. If there be error in the proceedings it is presumed to be injurious to the prisoner, and generally he is entitled to a reversal, having a constitutional right to stand upon strict law. 18 *Cal.* 187.

323. It is discretionary with the court to permit the jury to make this "view" and possibly the court would grant the prisoner the same right. 18 *Cal.* 187.

324. A mistake by the judge in stating the testimony to the jury on a trial for murder is not a sufficient ground for setting aside a verdict finding defendant guilty of manslaughter, where the character of the mistake renders it improbable that the verdict was influenced thereby. 20 *Cal.* 432.

325. It is error for the judge in stating the testimony to the jury, to read a memorandum of testimony taken by another person instead of using his own minutes, or making the statement from recollection. 20 *Cal.* 432.

CHAPTER XXXV.

DISPOSAL OF PROPERTY, STOLEN OR EMBEZZLED.

326. SEC. 602. When property alleged to have been stolen or embezzled shall come into the custody of a peace officer, he shall hold the same subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

327. SEC. 603. On satisfactory proof of the title of the owner of the property, the magistrate to whom the information is laid, or who shall examine the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property.

328. SEC. 604. If the property stolen or embezzled come into the custody of the magistrate it shall be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

329. SEC. 605. If the property stolen or embezzled have not been delivered to the owner, the court before which a conviction is held for stealing or embezzling, may, on proof of his title, order it to be restored to the owner.

330. SEC. 606. If the property stolen or embezzled be not claimed by the owner, before the expiration of six months from the conviction of a person

for stealing or embezzling it, the magistrate or other officer having it in custody, shall, on the payment of the necessary expenses incurred for its preservation, deliver it to the county treasurer, by whom it shall be sold, and the proceeds paid into the county treasury.

331. SEC. 607. When money or such other property is taken from a defendant arrested upon a charge of a public offense, the officer taking it shall at the time give duplicate receipts therefor, specifying particularly the amount of money and the kind of property taken; one of which receipts he shall deliver to the defendant, and the other of which he shall forthwith file with the clerk of the court, to which the depositions and statement must be sent, as provided by section one hundred and seventy-six.

CHAPTER XXXVI.

OF PROCEEDINGS IN JUSTICES', RECORDERS', AND MAYORS' COURTS.

332. SEC. 608. All proceedings and actions before a justice's, recorder's or mayor's court, for a public offense, of which said courts have jurisdiction, shall be commenced by complaint setting forth the offense charged, with such particulars of time, place, person and property, as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint.

333. The object of pleading is to apprise a party of the precise charge made against him and to enable him to defend himself and to avail himself of all his legal rights and privileges. (Criminal case.) 12 *Cal.* 294.

334. Murder is a conclusion drawn by the law from certain facts, and in order to determine whether it has been committed it is necessary that the facts should be stated with convenient certainty. 6 *Cal.* 209. The allegation in an indictment of a legal conclusion instead of the facts which are the predicate of a conclusion is not sufficient. 6 *Cal.* 209.

335. SEC. 609. When the complaint is laid before the justice, mayor or recorder, of the commission of a public offense, of which the courts held by them have jurisdiction, he must examine on oath the complainant or prosecutor and any witness he may produce, and take their depositions in writing and cause them to be subscribed by the parties making them.

336. SEC. 610. If the justice, mayor or recorder, as the case may be, be satisfied therefrom that the offense complained of has been committed, he shall issue a warrant of arrest, which shall be substantially in the following form:

County of .....

The people of the state of .... to any sheriff, constable, marshal or

policeman in this state: Complaint upon oath having been this day made before me [justice of the peace, mayor or recorder, as the case may be], by ...., that the offense of [designating it generally], has been committed, and accusing .... thereof, you are therefore commanded forthwith to arrest the above-named .... and bring him before me forthwith at [naming the place].

Witness my hand and seal at ...., this .... day of ...., A.D. 18..

....

337. SEC. 611. On being arrested, the defendant may plead to the complaint or he may answer and deny the same. Such plea, answer or denial, may be oral or in writing, and immediately thereafter the case shall be tried, unless for good cause shown an adjournment or change of venue shall be granted. If an adjournment or change of venue be granted the defendant may be held to bail. If the defendant at any time before the trial apply for a change of the place of trial, and make it appear by affidavit that he has reason to believe and does believe that he cannot have a fair and impartial trial before the justice about to try the cause, by reason of prejudice or bias of such justice, the cause shall be transferred to another justice of the same or a neighboring township for trial. It shall be the duty of the justice ordering the change to require the defendant to appear before the justice to whom the transfer is made on a day named for trial, also all witnesses, and to transmit to such justice a certified transcript of his docket and all original papers in the cause. Should the defendant show to the satisfaction of the justice, by his own affidavit or otherwise, that he cannot have a fair and impartial trial by reason of the prejudice of the citizens of the township, the cause shall be transferred to a justice of a neighboring township: *provided*, if it appear by the defendant's affidavit that the same prejudice exists in any other township or townships, the cause shall be transferred to some township where no such prejudice exists.

338. Affidavits for continuance should show that the facts expected to be proved by the absent witnesses cannot otherwise be proved (so held in a murder case). 8 *Cal.* 89.

339. In criminal cases, on a motion for continuance by defendant on the ground of the absence of a material witness, based on an affidavit, sufficient in all particulars, and the materiality of the evidence being properly shown, it is the duty of the court in the absence of evidence tending to discredit or throw suspicion upon the application to postpone the cause to afford the prisoner reasonable time to procure the attendance of his witness. It is not sufficient that the district attorney agrees that the witness would depose to certain facts if present; he should admit the truth of these facts absolutely. It is the right of the accused to have his witnesses orally examined in court, and this right cannot be frittered away by compelling him

to go to trial in their absence without the benefit of their testimony, upon a statement of what that evidence would be; subject to impeachment. The value of oral testimony, over all other, is too well understood to suppose that such declarations would have the same weight on the minds of the jury as the testimony of the witness upon an examination before them in open court. The prisoner would lose another important advantage—that of confronting his witness with those called to impeach him, and the jury would be better able to arrive at the truth from a personal observation of the manner of each while testifying. 6 *Cal.* 249, 250.

340. SEC. 612. The defendant must in all cases be personally present before the trial shall proceed.

341. SEC. 613. A docket shall be kept by the justice, mayor or recorder, or in the recorder's court, by the clerk of the court, if there be one, in which he shall enter each action and the minutes of the proceedings of the court therein.

342. The record of a conviction by an inferior court must show, in order to protect the justice from liability to a person imprisoned pursuant to such conviction, that the case was within the limits of his jurisdiction. 2 *Gray.* (Mass.) 120.

343. SEC. 614. The defendant shall be entitled, if demanded by him, to a jury trial. The formation of the juries is provided for by special statute.

344. SEC. 615. The same challenges may be taken by either party to the panel of jurors, or to any individual juror, as may be taken on the trial of an indictment for a misdemeanor; but the challenge shall in all cases be tried by the court.

345. SEC. 616. The court shall administer to the jury the following oath or affirmation: "You do swear [or affirm, as the case may be] that you will well and truly try this issue between the people of the State of California and ...., the defendant, and a true verdict give according to the evidence."

346. SEC. 617. After the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public and in the presence of the defendant.

347. If one or more jurors in a criminal trial separate without leave of the court, so that such juror might have been improperly influenced by others, the verdict will be set aside. 5 *Cal.* 275. A juror has no right to separate from others without the permission of the court, even though the defendant's counsel consented to it. Neither can the affidavit of the juror thus absenting himself be ad-

mitted to purge his conduct from the imputation of corruption or impropriety; for if a party had been guilty of any corruption he would not hesitate to conceal the same by direct perjury. 5 *Cal.* 276, 277.

348. SEC. 618. The court shall decide all questions of law which may arise in the course of the trial; but shall give no charge with respect to matters of fact.

349. In criminal cases, it is fatal error to give oral instructions to the jury without consent of defendant, whether in the first instance or after the jury has returned into court for further instructions. 14 *Cal.* 437.

350. It is important to defendants in criminal cases that the principles of law which they invoke in their defense should be stated to the jury in clear and explicit terms, so that they may not be misunderstood. An instruction may be given in substance in language so different from that in which it was asked, as to be very difficult of comprehension, and it is always safer to repeat the instruction than risk misleading the jury by the refusal of one which is proper and pertinent. At any rate, if an instruction is refused for the reason that it has already been given, the reason of the refusal should be stated. 13 *Cal.* 172, 173.

351. Evidence of character can only be considered in relation to the particular crime charged, in cases where the guilt of the accused is doubtful. 6 *Cal.* 214. It is the duty and province of the jury to draw the inference of express malice from the facts and circumstances of the case, and the court has no right to instruct the jury that there was no malice. 6 *Cal.* 217.

352. SEC. 619. After hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: "You do swear that you will keep this jury together, in some quiet and convenient place; that you will not permit any person to speak to them, nor speak to them yourself, unless it be to ask them whether they have agreed upon a verdict; and that you will return them into court when he [they] have so agreed."

353. SEC. 620. The verdict of the jury shall in all cases be general.

354. SEC. 621. When the jury have agreed upon their verdict they shall deliver it publicly to the court, who shall cause the same to be entered on the minutes.

355. SEC. 622. When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those

in regard to whom they do agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury.

356. SEC. 623. The jury shall not be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharge them.

357. SEC. 624. If the jury be discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial; and so on, until a verdict be rendered.

358. SEC. 625. When the defendant pleads guilty, or is convicted, either by the court or by a jury, the court shall render judgment thereon of fine and imprisonment, or both, as the case may require.

359. SEC. 626. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be paid or satisfied.

360. SEC. 627. When the defendant is acquitted either by the court or by the jury, he shall be immediately discharged, and if the court certify in the minutes that the prosecution was malicious, or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security, by a written undertaking, with one or more sureties, to pay the same to the county within thirty days after the trial.

361. SEC. 628. If the prosecutor does not pay the costs, or give security therefor, as provided in the last section, the court may enter judgment against him for the amount thereof, which may be enforced in all respects in the same manner as a judgment rendered in a civil action.

362. SEC. 229. When a verdict is rendered, it shall be immediately entered upon the minutes.

363. SEC. 630. After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, the court shall appoint a time for rendering judgment, which shall not be more than two days or less than six hours after the verdict is rendered, and shall hold the defendant to bail to appear for judgment, and in default of bail he shall be committed.

364. SEC. 631. At any time before the judgment is entered, the defendant may move for a new trial, or in arrest of judgment.

365. SEC. 632. A new trial can be granted only in the following cases: 1st. When the trial has been had in his absence; *provided*, if he shall voluntarily absent himself with full knowledge that a trial is being had, a new trial shall not be granted on account of such voluntary absence; 2d. When the jury has received any evidence out of court; 3d. When the jury have separated without leave of the court, after having retired to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case; 4th. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors; 5th. When there has been error in the decision of the court given on any question of law arising during the course of the trial; 6th. When the verdict is contrary to law or evidence; 7th. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial; but when a motion for a new trial is made upon this ground, the defendant must produce at the hearing the affidavits of the witnesses by whom such newly-discovered evidence is expected to be given.

366. It is with reluctance that courts disturb the verdict of a jury in any case; but where there is no substantial contradiction in the evidence of the different witnesses, and taking the testimony for the prosecution alone and leaving out that of the defense, no ground appears upon which the verdict could stand, and it is manifest that the verdict must have been given under a state of great excitement preventing a fair and just trial, the court should grant a new trial. (Criminal case), 10 *Cal.* 196.

367. SEC. 633. The motion in arrest of judgment may be founded on any substantial defect in the complaint, and the effect of an arrest of judgment is to place the defendant in the same situation in which he was before the trial was had.

368. SEC. 634. If the judgment be not arrested or a new trial granted, judgment shall be pronounced at the time appointed, and entered in the minutes of the court.

369. SEC. 635. If judgment of acquittal be given or judgment imposing a fine only, and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given.

370. SEC. 636. When a judgment of imprisonment is entered, a certified copy thereof shall be delivered to the sheriff, marshal or other officer, which shall be a sufficient warrant for the execution of the same.

371. SEC. 337. When a judgment is entered imposing a fine or ordering the defendant to be imprisoned until the fine shall be paid, he shall be held in custody during the time specified in the judgment unless the fine be sooner paid.

372. A judgment in a criminal action that the defendant be imprisoned for a specified term, "to commence at the expiration of previous sentences," is valid and warrants the detention of the defendant for the aggregated period of all the sentences. 22 *Cal.* 135.

373. Judgments of inferior criminal courts created by statute are not required to be of any different form from those of criminal courts of general jurisdiction. 22 *Cal.* 135.

374. SEC. 638. Upon the payment of the fine the officer shall immediately discharge the defendant, if he be not detained for any other legal cause, and apply the money to the payment of the expenses of the prosecution, and pay over the residue, if any, within ten days to the county or city treasurer, according as the offense is prosecuted in a justice's or in a mayor's or recorder's court.

375. SEC. 639. If a fine be imposed and paid before commitment it shall be applied as prescribed in the preceding section.

376. SEC. 640. If a defendant be discharged on bail or has deposited money instead thereof, and fails to appear according to his recognizance,

the same shall be forfeited or the money appropriated in like manner as in the district court.

377. SEC. 641. In case of failure to appear for judgment, the court shall issue a warrant for the arrest of the defendant, and shall enter judgment whenever the defendant appears or is brought before it.

CHAPTER XXXVII.

OF SEARCH-WARRANTS.

378. SEC. 642. A search-warrant is an order in writing in the name of the people of the state of California, signed by a magistrate directed to a peace-officer commanding him to search for personal property and bring it before the magistrate.

379. SEC. 643. It may be issued whenever property has been stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled or of any other person in whose possession it may be.

380. SEC. 644. No search-warrant shall be issued but upon probable cause, supported by affidavit naming or describing the person, and particularly describing the property and place to be searched.

381. SEC. 645. The magistrate must before issuing the warrant examine on oath the complainant and any witnesses he may produce, and take their depositions in writing and cause them to be subscribed by the parties making them.

382. SEC. 646. The depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

383. SEC. 647. If the magistrate be satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he shall issue a search-warrant, signed by him with his name of office, to a peace-officer in his county commanding him forthwith to search the person or place named for the property specified and to bring it before the magistrate.

384. SEC. 648. The warrant shall be in substantially the following form:

County of .....

The people of the state of California to any sheriff, constable, marshal or policeman in the county of ....:

Proof by affidavit having been this day made before me by [naming every person whose affidavit has been taken] that [stating the grounds of the application according to section six hundred and forty-four, or if the affidavit be not positive that there is probable cause for believing that [stating the ground of the application in the same manner], you are therefore commanded in the day-time [or at any time of the day or night as the case may be, according to section six hundred and fifty-four] to made immediate search on the person of .... [or, "in the house situated ....," describing it, or any other place to be searched with reasonable particularity as the case

may be], for the following property [describing it with reasonable particularity], and if you find the same or any part thereof, to bring it forthwith before me at [stating the place].

Given under my hand and dated this .... day of ...., A.D, 18..

....,
Justice of the peace [or as the case may be].

385. SEC. 649. A search-warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person except in aid of the officer on his requiring it, he being present and acting in its execution.

386. SEC. 650. The officer may break open any outer or inner door or window of a house or any part of a house or anything therein to execute the warrant, if after notice of his authority and purpose he be refused admittance.

387. SEC. 651. He may break open any outer or inner door or window of a house for the purpose of liberating a person who having entered to aid him in the execution of the warrant is detained therein, or when necessary for his own liberation.

388. SEC. 652. The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavits be positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

389. SEC. 653. A search-warrant must be executed and returned to the magistrate who issued it within five days after its date, and if in any other county within thirty days; after the expiration of these times, respectively, the warrant shall unless executed be void.

390. SEC. 654. When the officer shall have taken any property under the warrant he must give a receipt for the property taken [specifying it in detail] to the person from whom it was taken by him or in whose possession it was found; or in the absence of any person he shall leave it in the place where he found the property.

391. SEC. 655. When the property is delivered to the magistrate he shall, if it was stolen or embezzled, dispose of it as provided in sections six hundred and three to six hundred and seven, both inclusive.

392. SEC. 656. The officer shall forthwith return the warrant to the magistrate and at the same time deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they be present, verified by the affidavit of the officer at the foot of the inventory and taken before the magistrate at the time, to the following effect:

"I, ..., the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

393. SEC. 657. The magistrate shall thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

394. SEC. 658. If the grounds on which the warrant was issued be controverted, he must proceed to take testimony in relation thereto.

395. SEC. 659. The testimony given by each witness must be reduced to writing, and certified by the magistrate.

396. SEC. 660. If it appear that the property taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken.

397. SEC. 661. The magistrate shall annex together the depositions, the search-warrant and return and the inventory, and return them to the next term of the court of sessions, having power to inquire into the offenses in respect to which the search-warrant was issued, at or before its opening on the first day.

398. SEC. 662. Whoever shall maliciously and without probable cause procure a search-warrant to be issued and executed shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five thousand dollars, or imprisonment not more than six months.

399. SEC. 663. A peace-officer who in executing a search warrant shall willfully exceed his authority or exercise it with unnecessary severity, shall be deemed guilty of a misdemeanor, and punished as in the next preceding section is provided.

400. SEC. 664. When a person charged with a felony is supposed by the magistrate before whom he is brought to have on his person a dangerous weapon or anything which may be used in evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order or to the order of the court in which the defendant may be tried.

CHAPTER XXXVIII.

OF PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

401. SEC. 665. A person charged in any state or territory of the United States with treason, felony or other crime, who shall flee from justice, and be found in this state, shall on demand of the executive authority of the state or territory from which he fled be delivered up by the governor of this state, to be removed to the state having jurisdiction of the crime.

402. It is not necessary that where a party is arrested as a fugitive from justice, escaped from another state, that the affidavit upon which the requisition issued should set forth the crime charged with all the legal exactness necessary to be observed in an indictment. If it distinctly charge the commission of an offense it is all that is necessary. Neither is it necessary that the affidavit should state that the prisoner is a "fugitive from justice"—the allegation that he committed the crime and then secretly fled is sufficient to deduce the conclusion that he is a fugitive from justice. 5 *Cal.* 238, 239.

403. SEC. 666. A magistrate may issue a warrant for the apprehension of a person so charged, who shall flee from justice and be found in this state.

404. SEC. 667. The proceedings for the arrest and commitment of the person charged, shall be in all respects similar to those provided in this act for the arrest and commitment of a person charged with a public offense committed within this state, except that an exemplified copy of an indictment found, or other judicial proceeding had against him in the state or territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

405. SEC. 668. If from the examination it appear that the person charged has committed treason, felony or other crime charged, the magistrate by warrant reciting the accusation, shall commit him to the proper custody within his county, for a time to be specified in the warrant, which the magistrate may deem reasonable to enable the arrest of the fugitive under the warrant of the executive of this state, on the requisition of the executive authority of the state or territory in which he committed the offense, unless he give bail as provided in the next section or until he be legally discharged.

406. SEC. 669. The magistrate may admit the person arrested to bail by recognizance with sufficient securities, and in such sum as he may deem proper for his appearance before him at a time specified in the recognizance, and for his surrender to be arrested upon the warrant of the governor of this state.

407. SEC. 670. Immediately upon the arrest of the person charged, the magistrate shall give notice to the district attorney of the county of the name of the person, and the cause of the arrest.

408. SEC. 671. The district attorney shall immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney or presiding judge of the criminal court of the city or county within the state or territory having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

409. SEC. 672. The person arrested shall be discharged from custody or bail, unless before the expiration of the time designated in the warrant or recognizance he be arrested under the warrant of the governor of this state.

410. SEC. 673. The magistrate shall make return of his proceedings to the next court of sessions of the county, which shall thereupon inquire into the cause of the arrest and detention of the person charged, and if he be in custody, or the time for his arrest have not elapsed, the court may discharge him from detention or may order his recognizance of bail to be canceled, or may continue his detention for a longer time, or may readmit him to bail, to appear and surrender himself within a time to be specified in the recognizance.

CHAPTER XXXIX.

COMPROMISING OFFENSES BY LEAVE OF THE COURT.

411. SEC. 675. When a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it is committed: 1st, By or upon any officer of justice while in the execution of the duties of his office; 2d, Riotously; 3d, With an intent to commit a felony.

412. SEC. 676. If the party injured appear before the court to which the depositions are required to be returned at any time before trial, and acknowledge in writing that he has received satisfaction for the injury, the court may in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom; but in such case the reasons for the order must be set forth therein and entered on the minutes.

413. SEC. 677. The order authorized by the last section shall be a bar to another prosecution for the same offense.

414. SEC. 678. No public offense shall be compromised, nor shall any proceeding for the prosecution or punishment thereof upon a compromise be stayed, except as provided in this chapter.

415. SEC. 679. All fines and forfeitures collected in any court of this state shall be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred, and after such costs are paid the residue shall be paid to the county treasurer of the county in which the court is held.

416. Fines imposed in the court of the mayor or recorder of a city or before any officer of a municipal corporation having authority to impose fines, must as a general rule be paid into the treasury of the city, town or other municipal corporation, unless the law specifically directs otherwise. There is no statute which interferes with this disposition of the fund arising from fines as far as concerns the city of Sacramento. 6 *Cal.* 425.

417. SEC. 680. If any clerk, justice of the peace, sheriff, constable or other officer who may receive any fine or forfeiture, shall refuse or neglect to pay over the same according to law, and within thirty days after the receipt thereof, he shall be liable upon his official bond for the amount thereof, with fifty per cent. damages and interest, to be recovered in like manner as for failing to pay over money received on execution, and shall be deemed guilty of a misdemeanor, and on conviction, may be fined in any sum not exceeding five hundred dollars or by imprisonment not exceeding three months.

CHAPTER XL.

MISCELLANEOUS PROVISIONS.

418. SEC. 681. The term "oath" where used in this act shall be deemed to include an affirmation.

419. SEC. 682. When a signature of a person is required by this act, the mark of the person, if he cannot write, shall be deemed sufficient, the name of the person making the mark being written near it, and the mark being witnessed by a person who writes his own name as a witness.

420. SEC. 683. When it is necessary for any purpose to have a person who is in prison in any part of the state brought before a court of criminal jurisdiction, an order for that purpose may be made by the court, and the order shall be executed by the sheriff of the county where it is made.

421. SEC. 684. Process issued by a court or magistrate shall be executed according to its terms.

422. SEC. 685. The term "magistrate" when used in this act signifies any of the officers mentioned in section one hundred and third.

423. SEC. 686. The term "peace-officer" when used in this act, signifies any one of the officers mentioned in section one hundred and tenth.

CHAPTER XLI.

OF THE COSTS IN CRIMINAL ACTIONS AND PROCEEDINGS.

424. SEC. 687. The only costs or fees allowed in a criminal action or proceeding shall be such as are prescribed by this act.

425. SEC. 688. The magistrate if he be a justice of the peace, or a mayor, or a city recorder, may receive for all the proceedings before him, to and including his decision upon the question of discharging the defendant or holding him to answer, three dollars; for taking bail after a commitment by another magistrate, one dollar.

426. SEC. 689. The clerk may receive on the trial of an issue where the charge is felony, five dollars; on the trial of an issue where the charge is a misdemeanor, two dollars; entering judgment, one dollar. He shall receive no other fee for any service whatever in a criminal action or proceeding, except for copies of papers at the rate of thirty cents for every hundred words.

427. SEC. 690. A peace-officer may receive for making an arrest, two dollars, together with twenty cents for every mile necessarily traveled by him in rendering such service, and in taking a defendant before a court or magistrate, or conveying him to prison; for serving a subpena, fifty cents, together with twenty cents for every mile necessarily traveled by him in rendering such service. The court of sessions may allow such further compensation for the service of process, and for other services in criminal cases as it may think reasonable.

428. SEC. 691. The sheriff may also receive for summoning a panel of

forty-eight jurors, twenty dollars; for summoning a panel of thirty-six jurors, fifteen dollars; for summoning a panel of twelve jurors, ten dollars; for executing a sentence of death, fifty dollars. Each juror shall receive for each day's attendance, two dollars, to be paid on the certificate of the clerk, which shall be issued during the term.

429. SEC. 692. The district attorney shall receive on each conviction for felony, when the punishment is death, fifty dollars; for each conviction for other felony twenty-five dollars; on each conviction for misdemeanor, the sum of fifteen dollars; which said sums shall be assessed against the one convicted, and if the same cannot be collected from the defendant, then it shall be considered a county charge, and be audited by the board of supervisors; *provided*, that [in] the counties of San Joaquin, Humboldt and Placer, the fees allowed by this act to district attorneys shall in no event become a county charge. The district attorney shall receive ten per cent. upon all collections upon forfeited recognizances.

430. SEC. 693. The fees allowed to justices of the peace and other officers having the jurisdiction and authority of justices of the peace, clerks, peace-officers and district attorneys shall, when the defendant is convicted, be considered and recovered against him as costs in the suit, and be collected in like manner as costs in civil cases.

431. SEC. 694. The fees allowed a sheriff for summoning jurors, jurors' fees and fees allowed magistrates, peace-officers and clerks, in cases where the defendant is acquitted, or where being convicted he is unable to pay the costs, shall be county charges, and shall be audited and paid in like manner as other charges against the county.

432. SEC. 695. Whenever any officer, except district attorneys, mentioned in this act receives a salary, he shall account for and pay over to the treasurer of the city of which he is an officer all fees collected by him under the provisions of this act.

Sec. 695 Cr. Pr. expressly exempting one officer would seem to imply very strongly that none others were to be exempted. 13 *Cal.* 295.

CHAPTER XLII.

SUPPLEMENTAL ACTS.

[Sections one and two contain the amendments to sections four hundred and eighty-one and four hundred and eighty-two of the act of 1851, therein inserted.]

433. SEC. 3. The appeal to the county court from the judgment of a justice's, recorder's, mayor's or police judge's court, shall be heard upon a statement of the case settled by the justice, police judge, recorder or mayor, embodying the evidence and such rulings of the court as are excepted to.

434. SEC. 4. Upon the appeal to the county court, if a new trial be granted, such new trial shall be had in the county court. If the judgment be affirmed, a copy of the judgment of affirmance shall be sent to the court

below, upon the receipt of which the court below shall proceed to enforce its sentence.

435. SEC. 5. All appeals from a justice's, mayor's, recorder's or police judge's court, remaining undetermined and now pending in any court of sessions shall be transferred to the county court of the proper county, and be heard and determined by said county court in like manner as if the appeal were originally taken to the county court under the provisions of this act.

436. SEC. 6. Nothing in this act contained shall apply to the police judge's court in the city of San Francisco, save the provisions of section one of this act.

INDEX.

[This Index is made in reference to pages and sections. The sections indexed are the sections of each chapter. In the Criminal Practice Act there will be found two rows of figures; the outer figures represent the sections of the book, the inner represent the sections of the statute.]

	PAGE.	SECS.
ABATEMENT	194	1–2
plea of, when to the jurisdiction	194	3
another action pending	195	4
parties must be the same	195	5–6
one suit in abatement of another	195	7–8
answer in, what it must show	195	9–11
misnomer	195	12–14
misjoinder and non-rejoinder	196	15–16
by death	196	17
ABANDONMENT, what constitutes	196	1–2
ACKNOWLEDGMENTS, statutes concerning	197	1–2
justices of the peace may take	199	2–8
forms of	200	3
what must state	201	4
recorders may take	201	9
ACTIONS, AGAINST STEAMERS, VESSELS, ETC	202	
jurisdiction, of courts concerning	202	1
what vessels are liable to	203	2
contract of voyage in vessels, jurisdiction of	203	3
may be brought directly against	204	4
complaint in	204	5
service of summons in	204	6–7
lien, when it attaches	204	8
attachment, when it may issue	205	9
undertaking	205	10
contents of writ of attachment	205	11
duty of constable when writ is delivered	206	12
who may appear and answer	206	13
proceedings in, how conducted	206	14
discharge of attachment after appearance	206	15
sale under execution, how made	207	16
claims for wages	207	17–18
notice of sale, what it must contain	208	19
appeals, who may take	208	20

	PAGE.	SECS.
ADJOURNMENT, discretionary with court	209	1
by consent	209	2-4
for a period not exceeding ten days	209	5-7
not exceeding four months	210	8
grounds for adjournment	211	9-11
affidavit for	211	12
form of	212	13
undertaking for, for four months	213	14
for of undertaking	213	15
when jury trial is demanded	213	16
justice may adjourn when jury has been summoned	213	17-19
when justice is officially occupied	214	20
justice may order case to stand open for trial	214	21-22
cannot open a case after day of trial has passed	214	23
cannot hold a case open when there is no issue	214	24
when a jury is being summoned	215	25-27
waiver of irregularity in	215	28-29
APPEALS, how taken	218	1
distinct classes of	218	2
on questions of law, how tried	219	3
in what time to be taken	219	4
when appellant dies on same day	219	5
from judgment by default	220	6-7
from judgment of non-suit	220	8
one of several defendants may appeal	220	9-10
absence of justice during the time in which appeal can be taken	220	11
written agreement to abide decision of justice	220	12
notice of	221	13-19
statement on	222	20-23
justice must transmit transcript	223	24
a justice not being successor to another	223	25
what must appear from the transcript	223	27
when record does not show notice of	224	28
payment of costs, condition of	224	29-31
certificate of justice	224	32
undertaking on	225	33
undertaking when taken by the county	225	34
undertaking when taken by the state	225	35
undertaking when is a contract on the part of sureties	225	36
undertaking sureties on, need not appear in the body of	226	37
undertaking when it is the deed of both sureties	226	38
undertaking when statute has not been followed	226	39
bond, construction of	226	41
may annul bond	226	42
justice may stay proceedings	227	43-51
objection to appeal bond or want of bond	227	44-45
bond conditioned on an illegal consideration	227	46
a mere correction of judgment does not create liability	228	47
justification of sureties on appeal bond	228	48-49

	PAGE.	SECS.
APPEALS, *Continued.*		
statutory time to perfect appeal	229	50
form of notice of appeal and appeal bond	230	52
APPEARANCE, by defendant, notice of	231	1
what is an	232	2
to ask an adjournment is not	232	3
failing to appear, default entered	232	5
notice of appearance, form of	232	4
entry of default, form of	232	6
failure of all the defendants to appear	233	7
failure of only some of defendants	233	8–9
failure of either party to appear	233	10–11
by attorney	234	12–14
ARREST, writ of, what is	235	1
order to, must be indorsed	235	2
in what cases it may issue	235	2–3
in cases defendant cannot be arrested	236	4–8
affidavit, must make sufficient showing	237	9–13
form of affidavit, departing from the state	238	14
form of affidavit, removing property from the state	239	15
form of affidavit, fraudulent debtor	240	16
form of undertaking on order of	241	17
form of approval	241	18
form of order to be indorsed on summons	241	19
upon being arrested shall be taken before justice	242	20
when justice is a material witness	242	21
officer shall give notice of the arrest to plaintiff	243	22
form of affidavit	243	23
form of certificate to be indorsed on summons	243	24
duty of officer to keep the defendant	243	25
defendant may demand a trial	243	25
may demand on adjournment	244	25
form of undertaking by defendant on arrest	244	26
jury being called, questions of fraud must be submitted	245	27
facts constituting fraud must be specifically alleged	245	28
execution against the person unlike execution against property	245	29
facts authorizing arrest, constitute the cause of action	246	30
when sureties are liable on defendant's undertaking	246	32
ARGUMENT OF COUNSEL	247	1–2
ARBITRATION, rules of	247	1–3
appointment of	248	4
proceedings of	248	5
duties and powers of	249	6
who may submit controversy to	249	7
submission of cause to operate a discontinuance	251	8
must pass upon all matters submitted	252	9
an agreement of submission, must be that award become an order of court	252	10
award of	252	11–13

	PAGE.	SECT.
ARBITRATION, *Continued.*		
form of agreement	253	14
form of bond to abide award	253	15
form of notice of appointment	254	16
form of notice of hearing	254	17
notice of revocation of powers	254	18
notice of revocation by one party	255	19
form of oath of	255	20
ATTACHMENT, remedy by, what is it	256	1–5
may issue, in what actions	257	6–7
upon debts not due	258	8–11
when may the writ issue—summons	258	12
affidavit that debt arises on contract	259	13
security by mortgage prevents an issuing	259	14
pledge of personal property prevents	259	15
duty of justice in issuing writs	259	16–18
the affidavit	260	19–21
forms of affidavits	261	22–23
the undertaking	262	24–25
form of undertaking	262	26
the bond must precede	262	27
the bond must not exceed the jurisdiction of the justice	262	28
is void if bond is executed after writ has been levied	262	29
rights of defendant in if he recover judgment	264	30
the writ of	264	31–33
form of writ	264	34
undertaking on release of, to be given to constable	265	35
the property subject to	266	36–41
execution of the writ	268	42
how real property is to be attached	270	45
when it operates as lien	270	45
how personal property is attached	271	47–54
when the lien takes effect	272	55–59
rule in contests between attaching creditors	273	60–68
garnishment, statute	276	69
garnishee's liability	277	70
garnishee a trustee	277	72
what he must answer	277	73
promissory note before due	277	74
justice may render judgment against garnishee, for what	277	75
when garnishee disposes of property, effect of	277	76–78
for, of garnishment	279	79
examination of debtor or his bailee	279	80
court may order property delivered to sheriff	280	81–82
the garnishee entitled to an early examination	281	83
form of order of examination of defendant	281	84
form of constable's certificate of service	282	85
for, of order of examination of debtor of defendant	282	86
form of certificate of service	282	87
constable must return inventory of property attached	283	88

	PAGE.	SECS.
ATTACHMENT, *Continued.*		
constable shall return writ with summons	283	89
mistake in return may be corrected	283	90
forms of return of writ	284	91–96
duty of constable with respect to property attached	286	97–102
claims by third persons	287	103–104
constable may protect himself by an indemnity bond	288	105
form of an indemnity bond	289	108
discharge of, after levy	289	109
undertaking on such discharge	290	110–114
form of undertaking	265	35
discharge of, for being improperly or irregularly issued	294	116–119
suits against plaintiff in	295	120
ACTIONS TO RECOVER POSSESSION OF PERSONAL PROPERTY, replevin when it lies	368	1–6
demand when necessary	370	7–11
demand when unnecessary	371	12–14
pleadings in	372	15–17
judgment in actions of	373	18–20
return of property after judgment	381	34
execution, when property cannot be taken under	374	21
damages, measure of	374	22
delivery of property before answer	375	23
affidavit on claim of delivery of	375	24
affidavit, form of	376	25
order to take property	376	26
order, form of	377	27
order and affidavit, duty upon receipt of	377	28
undertaking, form of	378	29
undertaking, suits on	378	30–32
undertaking, effect of	380	33
return of property, when defendant may require	382	36
return of, form of undertaking on return of property	383	37
sureties on undertaking	382	35
sureties, defendant's exceptions to	382	35
sureties, justification of	383	38
certificate of justification of	384	39
property, how taken and kept	384	40
claims by third persons	384	41
return by officer	385	42
ATTORNEYS AT LAW, authority and relations as to the courts	295	1–6
BILLS OF EXCHANGE, PROMISSORY NOTES, ETC.		
promissory note—definition	297	1
what constitutes	297	2
inland bill of exchange, its principal requisites	298	3–4
checks and bills of exchange, the difference	298	5
certificate of deposit	299	6
bills of credit	299	7
note beginning, "I, ..., promise to pay"	299	8
value received	299	9

BILLS OF EXCHANGE, ETC., *Continued.* PAGE. SECS.
negotiable paper, what is....299 10-16
consideration, what good....301 17-18
fraud, failure or illegality of consideration....301 19-20
presumption, consideration valid....301 21
fraud, avoids....301 22
guaranty, what is....302 23
want or illegality of consideration....302 24
possession of, evidence of ownership....303 26
agreement to extend payment of....303 26
the effect of fraud as to a portion of the consideration....304 27
consideration may be required with, at any time....304 28
notes deposited as collateral security....304 29-32
interest, when it begins to run....305 33
when the receipt of, is payment of a debt....305 34-39
alteration of....309 40
when a blank is left, to be filled up....309 41
rate of interest left blank to be filled up....309 42
payment of....309 43-47
when note or draft is payable....311 48-50
place of payment....311 51-52
when check must be presented....312 53
demand on maker....313 54
must not be presented at a late hour....313 55-57
demand should be made on third day of grace....314 58
note payable on demand, a suit is sufficient demand....314 59
sight notes....314 59
notes payable in installments....315 61
indorser, his contract....315 62
indorsor entitled to notice....315 63
indorser must have a clear title or his indorsement is void.315 64-65
indorser when charged and not....316 66-71
notice to indorser, when to be given....317 72-78
notice, how served....319 79-80
notice, manner of....320 81-84
form of notice of demand and non-payment....322 86
form of notice of protest for non-payment....322 87
form of notice of protest for non-acceptance....323 87
acceptor of bill....323 88-95
protest of notary, what it should contain....325 96-101
waiver of presentment and notice, how proved....328 102-104
damages on foreign bills....329 105
guarantor, who is....330 106-107
his liability, how fixed....330 108
in consideration of time....330 109-110
when indorser is a guarantor....331 111-112
guarantors entitled to notice....333 113
sureties....334 114-116
surety, when released....337 117
surety against maker....337 118

	PAGE.	SECS.
BILLS OF EXCHANGE, ETC., *Continued.*		
when and by whom suit can be brought on note	338	119–127
past notes or checks or negotiable paper	340	128
in case of loss or destruction	340	128–130
assignment of, before maturity	340	131–133
assignment of, after maturity	341	134–139
defense by maker against assignee	344	140
execution of, how proved	344	
execution signed with an X or mark	344	141
attesting witness not indispensable	344	141
agents, executed by	345	142–143
when principal is bound	346	143
agent signing his own name to a promissory note	347	146
corporations, executed by	348	147–148
infants, executed by	348	149
partners, executed by	348	150–152
guardians, trustees, executed by	349	153
wife, executed by	350	154–156
forms	351	157–165
checks, rules in regard to	352	164
CALLING OF CAUSE, how long justice should wait	354	1
when he may proceed	354	2
when a particular hour is fixed	355	3
CERTIORARI, is the remedy when	355	1
return to writ of	355	2–4
errors in the exercise of jurisdiction	227–373	43–20
CHATTEL MORTGAGES, the subject of	356	1
how and when executed	357	2–5
redemption, the right of	358	6–18
effect of	359	7–17
form of	361	19
CONTRACTS IN GENERAL, of which justices have jurisdiction	36	1
classification	37	2
judgment of court	37	3
consideration	38	4
past consideration	38	5
writing under seal	38	6–8
writing not under seal	38	7
kinds of consideration	39	9
express or implied	39	10
who may make	40	11–15
against public policy	41	16
an unlawful act already done	42	17
in restraint of marriage or trade	42	18
imprisonment or duress	42	19
ESTATES OF DECEASED PERSONS, claims against	362	1
claims, meaning of	362	2–12
claims presented before publication of notice	363	3
claims, when must be presented	363	5–6
claims must be sustained by affidavit	364	6–7

	PAGE.	SEC.
ESTATES OF DECEASED PERSONS, *Continued.*		
claims when not due at the time of the first publication of notice	364	8
claims rejected by executor or administrator	365	9
claims barred by statute of limitation	365	10–11
claims when executor or administrator is willing to allow part of	366	18
creditor who is	363	4
judgment, when recovered	366	13
judgment against administrator or executor	366	14–15
judgment against deceased in his life-time	367	20
action pending against testator or intestate	366	16
CONTEMPTS, justice may punish for	385	1–2
justice may issue a warrant for abusive words	386	3
justice, his order must be lawful	386	4
for resistance or disobedience	386	5
courts are exclusive judges of their contempts	386	7
commitment for contempt	386	6
when committed in the presence of the court	386	8–12
general power of, in cases of	387	9–11
warrant of arrest, form of	387	12
COSTS, an incident to the judgment	388	1–2
affidavit accompanying bill of	388	3
amendment of bill of	388	4
case must be determined	388	5
attorney has no lien for his fees	388	6
upon appeal	388	7
CRIMINAL PRACTICE, General Definitions and Provisions	771	1–10
limiting counsel in argument	772	11
confession in evidence	772	12
cannot be subject to a second prosecution	772	13–16
cannot be made to testify against himself	773	17
must be convicted by a jury	773	18
Of the Prevention of Public Offense	773	
lawful resistance	773	19–23
Of the Intervention of the Officers of Justice	774	24
Security to Keep the Peace	774	25–40
form of complaint to obtain surety of peace	776	41
form of warrant of arrest	776	42
return of sheriff or constable to be indorsed on warrant	777	43
admitting accused to bail	777	44
form of order of discharge	777	45
form of peace bond	778	46
form of commitment	778	47
Police in Cities and Towns, their attendance at exposed places	779	48–49
Suppression of Riots	779	50–60
Of the Removal of Civil Officers, otherwise than by impeachment	780	61–73
Of the Proceedings in Criminal Actions, prosecuted by indictment	781	74–85

CRIMINAL PRACTICE, *Continued.* PAGE. SECS.
Of the Time of Commencing Oriminal Actions....783 86–91
Of the Complaint, and the Officers Authorized to hear it....784 92–94
Warrant of Arrest....784 95
presumption in favor of jurisdiction of justice....784 96
depositions taken before a committing magistrate may be used before a grand jury....784 97
depositions not admissible on his trial....784 98
what depositions must set forth....784 99
what affidavit must contain....784 100
charge according to best knowledge and belief....785 101–102
justice must be satisfied that an offense has been committed....785 103–105
form of warrant of arrest....786 106–107
every justice of the peace is a committing magistrate....786 108
what warrant must specify....787 109
to whom directed....787 110–114
when the offense charged is a felony....787 115
when a misdemeanor....787 116
admission to bail must be certified on the warrant....787 117
duty of constable when bail is not given....787 118–119
must be taken before a magistrate without delay....788 120
when taken before a magistrate who did not issue the warrant....788 121
when complaint is laid before a justice of an offense triable in another county....788 122–123
Arrest, by an officer under warrant....788 125–134
by an officer without a warrant....789 135–140
by a private person....790 141–144
retaking after an escape or rescue....790 145–146
examination of the case and discharge of the defendant, or holding him to answer....790 147–167
where a crime different from that charged in the affidavit appears to have been committed....793 168
if the offense be not bailable, the words to be used....793 169
if the offense be bailable, the words to be used....793 170–171
commitment, form of....793 173
commitment, explanation of....793 174–175
recognizance of witnesses....795 176–180
when magistrate discharges defendant....795 182
Of Proceedings after Commitment and before Indictment...796 183–185
Powers and Duties of a Grand Jury....796 186–189
Presentment and Proceedings Thereon....797 190–196
Form of Indictment....798 197–200
Challenging the Jury....798 201–226
defendant may question jurors as to whether they have formed an opinion....801 227
implied bias....801 228
actual bias....801 229
how to ascertain the existence of bias....801 230

CRIMINAL PRACTICE, *Continued.* PAGE. SECS.
an unqualified opinion....801 231
competency of juror....801 232–233
exemption from service as a juror no cause for challenge..801 234
bias generally....801 235
adverse party may except to challenge....801 236
trial of challenge....802 237–344
Appeals, When Allowed and How Taken....802 245–253
form of notice of appeal....803 254
appeal from order to deliver stolen property....804 255
appeal when perfected....804 256–259
appeal when crime is less than a felony....804 260
statement on appeal in criminal cases....804 261–262
appeal from the police court of San Francisco....804 262
when judgment is reversed....805 263
judgment of affirmance....805 264
remittitur....805 265
In What Cases Defendant may be Admitted to Bail....805 266–273
Bail upon being Held to Answer before Indictment....807 275–280
Bail upon Indictment before Conviction....808 281–284
Bail upon Appeal....809 285–288
Deposit Instead of Bail....810 289–291
Surrender of the Defendant....810 292–295
Forfeiture of Recognizance or of the Deposit of money....811 296–299
Recommitment of the Defendant after having given Bail...811 300–306
Compelling the Attendance of Witness....813 307–317
Insanity of Defendant....814 318
Entitling Affidavits....814 319
Errors and Mistakes in Pleadings and Other Proceedings...814 320–325
Disposal of Property Stolen or Embezzled....815 326–331
Proceedings in Justices', Mayors' and Recorders' Courts...816
must be commenced by complaint....816 332
object of pleading....816 333
must state facts....816 334
when complaint is made, must examine complainant on oath....816 335
when justice must issue warrant....816 336
form of warrant of arrest....816 336
defendant may plead, answer or deny complaint....817 337
continuance....817 338–339
must be personally present....818 340
docket, what it shall contain....818 341
what record must show....818 342
defendant entitled to a jury trial....818 343
challenges of jurors....818 344
court shall administer oath....818 345–346
jury separating, effect of....818 347
court shall decide all questions of law....819 348–351
jury, after hearing proofs and allegations, may decide....819 352
verdict shall be general....819 353

CRIMINAL PRACTICE, *Continued.*	PAGE.	SECS.
verdict must be delivered publicly	819	354
when several defendants are tried together	819	355
the jury shall not be discharged except for good cause	820	356
when discharged a new trial shall be had	820	357
when defendant pleads guilty	820	358
judgment	820	359
when defendant is acquitted	820	360
prosecutor may be made to pay costs of prosecution	820	360
judgment against prosecutor, how enforced	820	361
verdict must be immediately entered	820	362
after verdict court shall deliver sentence in not more than two days or less than six hours	820	363
may move for a new trial before sentence	820	364
when new trial shall be granted	820	365–366
motion in arrest of judgment, on what founded and its effect	821	367–368
judgment of acquittal	821	369
judgment of imprisonment	821	370
judgment imposing fine	821	371–373
when fine is paid defendant shall be discharged	821	374
application of fine	821	375
when defendant is discharged on bail and fails	821	376
in case of failure to appear for judgment	822	377
Search Warrants	822	378–400
Proceedings against Fugitives from Justice	824	401–410
Compromising Offenses by Leave of the Court	826	411–414
fine, application of	826	415–417
Miscellaneous Provisions	827	418–423
Costs in Criminal Actions and Proceedings	827	424–432
Supplemental Acts	827	433–436
DAMAGES, amount of, question of fact	389	1
rule in regard to	389	2
contemplated and contingent profits not allowable	389	3
in case of negligence simply	389	4
when property converted has a fixed value	389	5
jury must find damages	389	6
in actions for personal torts	389	7
for cutting down growing trees	390	8
for loss of time	390	9
for collision	390	10
for failure to deliver goods	390	11
when damages should be nominal	391	12
rule when goods are not delivered according to contract	391	13–14
against common carriers	391	15–17
for nuisance	392	18
against sheriffs for wrongful seizure	392	19
DEPOSITIONS, who may take	395	1
of a party to an action	395	2
statute in regard to, must be complied with	395	3

	PAGE.	SEC.
DEPOSITIONS, *Continued.*		
mode of taking, pointed out by statute	395	4
the suppression of the reading of	396	5
interpretation of	396	6
either party may take	396	7–9
notice to take depositions	396	10–18
certificate to	399	19–22
objections to	399	23
when made	399	23–24
when waived	400	25
exceptions to, generally	400	26–29
DEPUTATION, blanks to be filled	393	1
order of justice to fill blank or change or alter dates	393	2–3
in case of sickness	393	4
general powers to deputize	393	5–13
EXECUTION, when it shall issue	457	1–2
what to contain	457	2
to whom directed	457	4
in what manner served	458	5–9
property exempt from	459	10
household furniture	461	11–13
horses exempt	462	14–30
homestead	462	15–20
life insurance	463	21
property hypothecated	463	22
franchise	463	23–25
separate property of wife for husband's debts	464	26–27
separate property of husband for wife's debts	465	28
service, manner of	466	31–32
property in the custody of the law	465	29
levy, how made	466	33–41
sale under, notice of	468	42–48
certificate of sale	470	49–51
purchaser refusing to pay	471	52–53
redemption of property sold	472	54–59
purchaser evicted may recover price of	475	60
deed of property sold by sheriff	476	61–62
FENCES	476	1–11
FERRIES AND TOLL BRIDGES	481	1–3
FORMER RECOVERY	482	1–10
FRAUD, definition of	485	1
conveyances, leases	485	2–4
trusts, void for	486	5–7
agreements not in writing	486	8–15
contracts for sale of goods	488	16–19
immediate delivery and continued possession	489	20–21
rule under our statute	490	22
delivery of hay	490	23
must be actual	491	24–27
must be immediate	491	25

	PAGE.	SECS.
FRAUD, *Continued.*		
growing crops	491	26
delivery of property in the possession of a bailee	491	28
possession of mortgages	492	29–31
hinder and delay creditors	493	32–34
intent	494	35–36
lands and conveyances	494	37
as between parties	495	38–40
proof of	495	41–43
GOODS, confusion of	496	1–4
INJURIES TO PERSON AND CHARACTER	497	1–2
INJURY TO PERSONAL PROPERTY, how divided	497	1
general rule	497	2
ordinary care	498	3–11
INJURIES TO THE PERSON		
civil action for damages for the death of a person	500	1
passenger of a stage coach	501	2
rule of law as between master and servant	501	3–8
master not responsible when he has no right to choose his agent	503	9
rule as to injuries by the construction of buildings	503	10–11
when contractors are liable	504	12
county not liable	504	13
intoxication no excuse for	504	14
vindictive damages, when given	505	15
when action cannot be maintained	505	16
INSOLVENT, when discharged from his debts	505	1
jurisdiction in cases of	505	2
discharge under, when a bar to actions for debt	505	3
joint application of partners void	505	4
an assignment to creditors	506	5
preference by	506	6
meeting of creditors	506	7
property of, transferred to the court	506	8
when fraud is charged	507	9
an insolvent's discharge	507	10
when insolvent has had benefit of the act	507	11
concealment of his property	507	12
after assignment, property vests in assignee	508	13
subsequent promise will make him liable	508	14
INTEREST, what is	508	1
when a larger per cent. than legal interest is allowed	509	2
allowed by way of damages	509	3
act to regulate interest	509	4
follows contract	509	5
who liable for	510	6–7
when recoverable	510	8–9
amount for which judgment should be rendered	510	10–11
computation of	511	12–13
INSTRUCTIONS, what is an instruction	511	1
what it should be	512	2

	PAGE.	SECS.
INSTRUCTIONS, *Continued.*		
must not be given as to matters of fact	512	3
must be in regard to the law	512	4
should conform to the pleadings	512	5
must be adapted to the facts	512	6
article 6, sec. 7 of constitution alluded to	512	7–8
erroneous when	513	9–10
where answer is insufficient	513	11
when allegations are admitted	513	12
where evidence is insufficient	513	13
conflicting	513	14
on abstract questions of law	513	15
court should give or refuse	514	16–18
may read from memoranda	514	19
when reason of refusal should be stated	514	20
when the same has been given	514	21
after jury have retired	514	22
in justice's court	514	23–27
JUDGMENT, definition of	515	1–4
is property	516	5
when valid	516	6–12
by default	517	13–22
how and when to be rendered	518	23–26
on joint and several contracts	518	27–29
specific contracts	519	30–31
when claim exceeds jurisdiction	519	32–35
in cases of arrest	520	36
in replevin	520	37
offer to allow	520	38
by confession	521	39–40
form of	521	41
must be signed by each	522	43–44
cost taxed	523	45–46
interest on	523	47–48
lien by justice's judgment	523	49
JUSTICES OF THE PEACE, election, qualification and term of office	17	1
distribution of judicial powers	17	2
number of, determined by the legislature	17	3
number to be elected	17	4
by whom elected	17	5
in incorporated cities and towns	17	6
when to be elected	18	7
in case of the formation of new township	18	8–9
must receive certificates of election	18	10
must be commissioned	18	11
by what authority	19	12
acting as such, proof of authority to act	19	13–18
oath of office	19	14
before whom taken	19	15

JUSTICES OF THE PEACE, *Continued.*	PAGE.	SECS.
must subscribe oath	19	16
must execute bond	19	17
form of bond	19	17
when office of, shall become vacant	19	19
what creates a forfeiture of	21	21
indicted for drunkenness and found guilty	21	22
mal-administration	21	23
removal from county	21	24
temporary removal of	21	25–26
where a justice forfeits his office by accepting another	22	27
when he is justice *de facto*	22	28
what is of itself a surrender	22	29
JURISDICTION OF JUSTICES, general rule as to	22	1
amount in controversy	23	2
judgment beyond jurisdiction	23	3
jurisdiction statutory	23	4
when first court show jurisdiction	23	5
when balance of account is within	23	6–21
objections to, how taken advantage of	27	20–21
nature of actions of which justices have jurisdiction	28	22–32
to what actions jurisdiction shall not extend	31	33
injuries to mining claims	31	34
injuries to personal property	32	34
injury for diversion of water	32	34
of action involving title to real estate	32	35–49
LANDLORD AND TENANT, relation of	524	1–4
eviction of tenant	525	5–7
rents, payment of	525	8–12
tenant entitled to fixtures, rule of law concerning	526	13–18
time for exercising right to recover fixtures	528	19–20
assignor of leasehold estate	528	21
executors of assignees	529	22–23
conventional landlord can alone remove tenant	529	24
demand of tenant before action	529	25
when action for unlawful detainer lies	529	26–30
tenancy terminating by eviction	530	31
form of lease	530	32
LIENS OF MECHANICS AND OTHERS	532	
mechanics'	532	1–6
stablemen and ranchmen	542	7
possession of goods necessary	542	8
master of a ship	543	9
inn-keepers	543	10
carriers	544	11
vendors of real estate	544	13
LIMITATIONS, STATUTE OF	545	
statute	545	1
decisions respecting	546	5–18
LIQUIDATION OF DAMAGES	550	1–5

	PAGE.	SECS.
MANNER OF COMMENCING ACTIONS	553	
how actions shall be commenced	553	1–7
how guardians appointed	553	8–9
form of application of infant plaintiff for guardian	555	10
form of application of relation for infant	555	11
form or consent of guardian of	556	12
form of nomination of guardian by infant defendant over fourteen years	556	13
MINES AND MINING CLAIMS	557	
legislation on the subject of mines	557	1–3
custom and usage	561	4–8
use of water	562	9
extent of right, or claim of	563	10–12
of work done on a claim	564	13–19
entry on private lands	567	20–23
how acquired and held	570	24–29
capacity of tenants in common to hold under a company name	572	30
right to give away a mining claim	572	31
how conveyed or transferred	573	32–42
how lost	575	43
abandonment	575	44–50
when forfeiture takes place	576	51–54
partition of	577	55
mining partnership	577	56–58
injury or trespass to	579	59–62
actions to secure possession of	582	63
statute of limitations	583	64
foreign miners	583	65
act to regulate the rights of the owners of mines	583	66
MORTGAGE PLEDGE, pledges generally	587	1–2
pledge and chattel mortgage, distinction between	587	3–9
chattel mortgages, statute concerning	590	10
form of chattel mortgage	591	11
mortgage of real estate	592	12–14
form of	593	15
NEW TRIALS, new trial defined	594	1–3
surprise as a ground for a new trial	595	4–8
unpreparedness	596	9–10
excessive damages	596	11–12
verdict not sustained by evidence	597	13
conflicting evidence	597	14–16
newly discovered evidence	597	17–25
improperly admitted evidence	599	26–29
evidence given by mistake	600	30–31
disqualification of juror	601	32
when defendant is not liable	601	33
the motion for	601	34–35
affidavit on motion for	601	36–39

NEW TRIALS, *Continued.*	PAGE.	SECS.
notice of motion for	602	40–41
statement on motion for	602	42–43
court may impose terms	603	44
rules to be observed on application for	603	45–51
effect of granting new trial	604	52
NONSUIT, statute	604	1
is a question of law	605	2
when it shall be granted	605	3–8
motion for, should state ground	606	9
NUISANCES, what is a nuisance	606	1–8
jurisdiction of	608	9
OFFICERS	609	1–7
SET-OFF, OR COUNTER CLAIM, what is	610	1
statute concerning	610	2–6
effect of	611	7
where it can and cannot be pleaded	612	8–14
judgment may be set-off	613	15–20
PARTIES TO ACTIONS, by what names parties to be styled	615	1
the state	615	2
counties	615	3–6
in whose names actions to be prosecuted	616	7–17
executors, administrators and trustees	618	18–20
husband and wife	618	21–30
infants	620	31–34
persons in interest	621	35–46
persons severally liable on same instrument	623	47–49
death, or disability of party or transfer of interest	623	50–52
PARENT AND CHILD, infancy, its termination	624	1–2
capacities and incapacities	624	3–5
of parents	625	6–13
PAYMENT, what is	627	1–7
by mistake of law	629	8–13
under protest	629	14–16
PERSONAL LIABILITY OF OFFICERS, of justices	630	1–3
of constables	631	4–8
PLEADINGS, definition and object	632	1–2
rules of	633–637	3
construction of	637	4
form of action and pleading	637	5
the complaint, what it is	637	6
complaint by administrators et al	637	7
complaint against administrators et al	638	8
complaint in actions of account	638	9
answers	638	10
pleas of new matter, payment, statute of limitation	639	11
separate defense	639	12
demurrers	639	13
striking out pleadings	640	14
amendment of	640	15

PLEADINGS, *Continued.*	PAGE.	SECS.
allegations and proof must correspond	640	16
verification of pleading	640	17
in justices' courts generally	640	18–23
construction of	642–645	24–25
rules of pleading in justices' court	642	26
pleadings in justices' courts	642	27
complaint in	642	28–46
answer in	645	47–54
demurrer in	646	55–60
when pleadings in, are to be in writing and verified	646	61–62
verification of pleadings in	647	63
form of verification by party to	648	64
form of verification by other person	648	65
what justice shall do with pleadings	648	66
amendments of pleadings	649	67–71
evidence under the pleadings	650	72–76
RELEASE	650	1–2
SUMMONS, the jurisdiction given by	651	1
contents of	651	2–6
time in which summons must, defendant to appear	652	7–8
blanks to be filled by justice only	653	9–10
amendment of summons	653	11
form of	654	12
SERVICE OF SUMMONS, when not necessary	655	1–2
acknowledgment of	656	3
by whom to be served	656	4
form of affidavit for deputation of person to serve	657	5
form of request to depute	657	6
form of deputation to be indorsed on summons	658	7
mode of service on corporations	658	8–10
against minors	659	11–12
against insane persons	659	13
in all other cases	659	14
return of service of summons	659	15–17
form of return on corporation	660	18
form of return, minor under the age of fourteen	660	19
form of return, insane person	661	20
form of return in all other cases	661	21
form of return when defendant cannot be found	661	22
mode of service when defendant is out of the state	661	23–25
form of affidavit for publication of summons	663	26
form of order for publication of summons	664	27
form of affidavit of publication of	665	28
SHERIFFS AND CONSTABLES	666	
statutes creating the office and defining the duties of	666	1–2
the office of	678	3–8
duties generally	679	9–25
diligence of	681	26–30
responsibility for deputy	682	31–36

	PAGE.	SECS.
SHERIFFS AND CONSTABLES, *Continued.*		
seizure of property, levy	683	37–56
sheriffs, levy by himself or deputy	686	57–73
indemnity	689	74–87
keeping goods	691	88–89
conflicting claims	691	90–92
writs of restitution	692	93–99
sale by	694	100–123
damages recoverable of	697	124–128
forms in criminal cases		Nos. 1–15
forms in civil cases		" 16–37
forms by constable		" 38–45
STOPPAGE IN TRANSITU	707	1–3
SUNDAYS	708	1–7
SURETIES, surety by undertaking	709	1–2
allowance of undertaking	710	
justification of	710	4
qualification of	710	5
TENDER	710	1–8
TIME	713	1–4
TRANSFER OF ACTIONS, to district court	714	1–2
to other justice	715	3
affidavit for transfer	716	4
form of affidavit	716	5
form of notice	717	6
TRESPASS	717	1–3
TRIAL, generally	720	1–4
in what townships or cities actions to be brought	721	5–12
right of trial by jury	723	13–15
when a jury shall be deemed waived	723	16–17
writ of venue	724	18
excepted counties, venue in civil or criminal actions	724	19
jury shall be summoned from the citizens of township	725	20–22
qualification of jurors	727	23–25
peremptory challenges	729	26–27
challenge for cause	729	28–30
duty and power of jury	730	31
duty of jury in the trial of civil cases	731	32–39
polling the jury	732	40
TROVER AND CONVERSION	733	1–5
TRUSTS	734	1–3
UNDERTAKING ON BONDS, generally	735	1–2
consideration	736	3–4
what is joint and several	736	5–6
liabilities of sureties	736	7–9
alterations and erasures	737	10
administrator's bond	737	11
injunction bonds	737	12–13
USE AND OCCUPATION	738	1–4
VENUE	739	1–3

	PAGE.	SECS.
VARIANCE	740	1–7
WARRANTY, in general	741	1–5
rules	742	6–7
WATER RIGHTS, preferred uses of water	743	1–4
nature of rights to water	745	5–7
rights to water by riparian ownership	745	8–9
what is an appropriation of water	746	10–11
rights by appropriation of	746	12–26
rights to use of, in public mineral lands	749	27
test of priority in claims to	750	28–29
mingling of water by different appropriators	751	30–31
actions for wrongful diversion of	752	32–33
injured by water	752	34–39
WITNESSES	754	1–12
Fees of Justices and Constables	756	1–8

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